United States Court of Appeals

for the Second Circuit

APPENDIX

Original

74-1138

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In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

THOMAS JOSEPH CARROLL, VINCENT McCLOSKEY and WILLIAM McCLOSKEY,

Appellants.

APPELLANTS' APPENDIX

Volume X, pp. 2746a - end

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UNITED STATES COURT OF APPEALS
FILED
JUN 13 1974
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

(6970) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

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A Yes. This is the typed-up version of the notes that were taken by Inspector Luker at the interview on the 13th of June.

Q Is that the copy that you signed?

A Yes, it is.

MR. KENNEY: Your Honor, we offer this, and state for the record that we delivered a copy to Mr. Hafetz.

THE COURT: Any objection?

MR. HAFETZ: No objection.

(Government's Exhibit 2 was received in evidence.)

MR. KENNEY: We have no further questions of this witness, your Honor.

THE COURT: Mr. Hafetz.

CROSS EXAMINATION

BY MR. HAFETZ:

Q Mr. Dexter, was there a complaint lodged against Mr. Rippy in this case in the Southern District of New York?

A I couldn't testify to that. I am not sure.

Q Was a complaint lodged anywhere prior to indictment?

A I am not familiar enough to say, sir.

Q When you saw Mr. Rippy at Lorton had he already been indicted in this case?

A No, he had not.

Q When was the indictment returned?

A I couldn't give you a date.

MR. HAFETZ: Could we have a stipulation on that, Judge, or Mr. Kenney?

MR. KENNEY: Yes. When was it returned?

MR. HAFETZ: Returned, filed.

MR. KENNEY: I believe it was June 14, 1973. Are you telling or are you asking me?

MR. HAFETZ: No, I am asking you.

MR. KENNEY: June 14, 1973, the first indictment was filed.

Q Was there a complaint filed against any of the defendants in this case, Mr. Dexter, prior to your going to see Mr. Rippy?

A I believe there were.

Q And in a complaint filed or the complaints filed was Mr. Rippy named?

A In the complaint?

Q Yes.

A I never saw a complaint myself. I couldn't say.

Q Do you recall,when the complaint was filed, whether it named Mr. Rippy or not?

A No, I don't know.

Q Was it your understanding that when you visited

Mr. Rippy at Lorton he was under arrest for the charge in this case at that time?

A No, that was not my understanding.

Q Had he been charged, had any charge been lodged against him in court at that time?

A I don't believe so.

MR. HAFETZ: Judge, may I inquire whether the court files show the date of complaint. I don't have the court files. Do you have any record?

MR. KENNEY: Your Honor, Mr. Hafetz asked me just a few minutes before the hearing started. I don't have the various complaints with me, and I don't know whether a complaint was filed against Mr. Rippy because I wasn't handling the case at the time the complaints were filed. But they are, of course, a matter of public record in the magistrate's court. I have, however, asked Mr. Carey to go back to my office and get the file, which will have the preliminary matter in it, and he will be back.

THE COURT: All right.

Q Mr. Dexter, approximately how long did the interview last with Mr. Rippy?

A Oh, I'd estimate a little bit over an hour, maybe an hour and fifteen minutes.

Q Were any efforts made prior to going into the

cell at Lorton to attempt to have Mr. Rippy produced for an arraignment in the area of Lorton, Virginia, prior to your interviewing him?

A I have no knowledge of that.

Q Did you confer with the Assistant United States Attorney here in New York or with any other law enforcement authority about attempting to arrange an arraignment of Mr. Rippy prior to interviewing him?

A No, I didn't.

THE COURT: What sort of an arraignment are you talking about?

MR. HAFETZ: An arraignment on a complaint.

Judge, if I may, can I hold off for just a few minutes on further questioning until I find out the exact date that complaint was lodged and whether Mr. Rippy was named in that complaint?

THE COURT: Yes.

MR. KENNEY: Your Honor, if I may, the complaints in our file are going to be -- this is the Government's file with regard to what happened preliminarily in this matter. I would go myself down to the magistrate's court and check their file and see if a complaint was filed against Mr. Rippy and when. I can't be assured that a copy of the complaint or the original draft is in this particular file

I have sent for. I would expect Mr. Hafetz would have --

THE COURT: Before whom is the complaint filed?

MR. KENNEY: It would have been, if there was a complaint filed in this district, it would have been in the magistrate's court. There is an alphabetical index there, and you could just look it up under the name Rippy. If there is no card for it, it would mean that no complaint had been filed.

THE COURT: Do you want to go look, Mr. Hafetz?

MR. HAFETZ: Yes. May I have a five-minute recess?

THE COURT: We will have a short recess.

(Recess)

BY MR. HAFETZ:

Q Mr. Dexter, did Mr. Rippy indicate to you that he had an attorney at the time that you interviewed him?

A No, he didn't.

Q You knew he was in prison on another charge at that time, obviously?

A Yes.

Q Did you know that he had an attorney representing him on that case?

A On another case?

Q The case in which or for which he was in prison

when you went to interview him.

A He didn't say, but I assume he did.

Q Did you ask him whether he wanted to get in touch with that attorney?

A I don't recall. I didn't ask him.

THE COURT: Did Mr. Luker ask him in your presence?

THE WITNESS: I can't remember.

Q Were any phone calls made to that attorney so far as you know?

A No, there weren't.

MR. HAFETZ: I have no further questions.

THE COURT: When was Mr. Rippy convicted on the charge for which he was imprisoned?

MR. HAFETZ: May 21 is the date. The date of sentence, excuse me.

MR. KENNEY: It was our understanding, your Honor, that he was serving a sentence.

MR. HAFETZ: And the case was and is pending appeal.

THE COURT: Is that the end of the hearing?

MR. HAFETZ: I have no further questions.

MR. KENNEY: We have no further questions, your Honor.

THE COURT: Let me see Exhibit 1, please.

What is your argument, Mr. Hafetz?

MR. HAFETZ: Judge, I say in all candor I have to determine certain facts before -- I thought we had a possible McNair Mallory violation, but there is no complaint lodged against Mr. Rippy downstairs. There is a complaint lodged against several other co-defendants on June 8, but Mr. Rippy is not named in that complaint. The time of the indictment, as it develops, Mr. Kenney has represented, is the day afterwards.

THE COURT: That is what my record shows.

MR. HAFETZ: Yes. So the only argument that I would make, Judge, is that Mr. Rippy had a lawyer, although on a different charge, and while the lawyer was not nor was he going to be involved in this case, I would state that I think the agents had perhaps some duty to contact the lawyer who had represented him and was his attorney of record in the case for which he was sent to prison, as to whether or not the lawyer would want to be present while Mr. Rippy was being questioned.

THE COURT: The motion is denied, Mr. Hafetz.

Have you furnished Mr. Hafetz with a copy of the indictment?

MR. KENNEY: Yes, I have, your Honor.

THE COURT: Have you read it, Mr. Hafetz?

MR. HAFETZ: No, I haven't. Mr. Kenney has told me the change that has been made in it.

THE COURT: Do you wish to plead now to it? Do you wish to plead to the superseding indictment now, just to save time?

MR. HAFETZ: Oh, yes. We will enter a not guilty plea now.

THE CLERK: The United States of America v. Robert E. Rippy, also known as Ripp, Criminal Indictment No. 73-855.

Mr. Rippy, please rise. Would you state your full and correct name for the record?

DEFENDANT RIPPY: Robert Ellis Rippy.

THE CLERK: Mr. Rippy, the gentleman standing on your right, Mr. Hafetz, is he your attorney?

DEFENDANT RIPPY: Appointed by the Court.

THE CLERK: Mr. Rippy, do you waive the detailed reading of this indictment and plead not guilty?

THE COURT: Have you discussed this with Mr. Rippy?

MR. HAFETZ: The change he just found out this morning, as I have, Judge, but I understand he does want to enter a not guilty plea.

THE COURT: No, I want to make clear for the record that you have explained to Mr. Rippy the change that was made in the superseding indictment, which is No. 73 Criminal 855, in place of 73 Criminal 606.

Have you told Mr. Rippy what that change is?

MR. HAFETZ: No, I haven't. May I see the indictment, and I will show it to him now?

THE COURT: Yes, certainly.

MR. KENNEY: Your Honor, may the record reflect that I have given Mr. Hafetz a copy of the indictment. I just want to make that clear.

MR. HAFETZ: You gave me a copy of the indictment?

MR. KENNEY: That is correct.

MR. HAFETZ: When?

MR. KENNEY: When you returned from the magistrate's court. I have another copy, which I will give you.

THE COURT: Sit down, Mr. Hafetz, with Mr. Rippy.

MR. HAFETZ: All right, Judge. I have showed the change to Mr. Rippy. I thought he heard the change, but I have now showed it.

THE COURT: I would much rather have Mr. Rippy's counsel tell him what is the superseding indictment rather than the United States Attorney.

MR. HAFETZ: I discussed with him he did want to plead not guilty to the indictment in any event.

THE COURT: He now understands what the change was.

MR. HAFETZ: Yes, he does.

THE COURT: Do you understand what the change was, Mr. Rippy?

DEFENDANT RIPPY: Yes, I do. It's a name.

THE COURT: That is all I know.

THE CLERK: Mr. Rippy, do you plead not guilty?

DEFENDANT RIPPY: Not guilty.

THE COURT: There is no bail here, is there?

DEFENDANT RIPPY: No, no bail was set, Judge, because he is serving another sentence in Virginia.

THE CLERK: Defendant remanded.

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FILED JAN 10 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

v. :

73 Cr. 855

VINCENT Mc CLUSKY, :

Defendant. :

Before:

HON. CHARLES M. METZNER,

District Judge

New York, December 4, 1973
Room 1106 - 10:15 a.m.

APPEARANCES:

PAUL J. CURRAN, Esq.,
United States Attorney for the
Southern District of New York,
John J. Kenney, Esq.,
Assistant United States Attorney

EDWARD PANZER, Esq.,
Attorney for Defendant

JOHN F. MARTIN, Esq.

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(Case called.)

MR. KENNEY: The government is ready.

MR. PANZER: Mr. McClusky is ready. I see that Mr. Martin is here and I understand that he wants to substitute me in this case. I have no objection. I don't know what Mr. Martin's position is going to be.

MR. MARTIN: I am ready, your Honor.

Since we met yesterday I met with Mr. McClusky and his family and they have asked me to represent him.

I am willing to do it and I would like to be substituted for Mr. Panzer.

THE COURT: Was there ever a substitution of you for Goldberg?

MR. PANZER: Yes. Your Honor signed the CJA form for me appointing me on the 27th of November.

THE COURT: But has there been a substitution of Goldberg, a formal substitution?

MR. PANZER: I think, your Honor formally assigned me at that time.

THE COURT: To relieve Goldberg?

MR. PANZER: Right, and I should be ready to go forward on the 10th with the trial of this matter.

Of course, I was to get full cooperation from Mr. Goldberg as of the 27th.

THE COURT: Yes. I think we ought to make the record clear, because I am not exactly clear as to what occurred that morning. I gather Mr. Goldberg is unable to continue in this case because of his commitment before Judge Knapp, which will possibly take him into January, commitment that has existed, as I understand from Judge Knapp, at least from last July, and he therefore agreed to withdraw from the casebecause of his inability to proceed.

You were appointed on his representation that the defendant didn't have the financial ability to retain an attorney. It was on that representation that I appointed you under the Criminal Justice Act.

Now I gather from Mr. Martin that you are now privately retained, Mr. Martin, by Mr. Mc Clusky.

MR. MARTIN: Yes, if the Court approves.

THE COURT: Mr. Mc Clusky, do you wish Mr. Martin to represent you in this proceeding?

THE DEFENDANT: Yes.

THE COURT: All right. Then you are formally substituted for Mr. Panzer, Mr. Panzer having been formerly substituted for Mr. Goldberg.

If Mr. Goldberg was not formally supplanted by Mr. Panzer, you are now substituted in Mr. Goldberg's place.

MR. PANZER: My recollection of the record is that I was, your Honor, formally substituted for Mr. Goldberg on the 27th.

THE COURT: All right.

The trial will proceed at 10 o'clock in this courtroom next Monday.

Mr. Martin, you have your requests to charge and any memorandum you wish to submit in my chambers by 5 o'clock Friday.

All right.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

v. :

73 Cr 855

THOMAS JOSEPH CARROLL, et al. :
. . . VINCENT "MIKE" McCLOSKEY . . ., 73 Cr 972
:

Defendants.

----------X

New York, N. Y.
December 8, 1973 - 10:30 a.m.

B e f o r e:

HON. CHARLES M. METZNER,

District Judge

Appearances:

PAUL M. CURRAN, Esq.
United States Attorney
For the Government
BY: JOHN J. KENNEY, Esq.
Assistant United States Attorney

JOHN F. MARTIN, Esq. and ROBERT C. CAREY, Esq.
Attorneys for the Defendant McCloskey

12-4

THE COURT: The reason I called you in here is that you served me with two letters addressed to me, copies of two letters addressed to the Assistant United States Attorney, and two sets of motion papers yesterday afternoon at 2:30. I immediately called your office to be here at 3:30. I was in the courtroom until a quarter after 5 on other matters, and when I completed my work on the bench at that time, I was told that you were conferring with Mr. Kenney, and that is why I told you to come back here today at 10:30 to dispose of these matters.

MR. MARTIN: If your Honor please, in response to the call for me to come down, since I wasn't in my office --

THE COURT: I understand that.

MR. MARTIN: -- as soon as I came back in, I came down to your Honor's chambers at quarter to 5.

THE COURT: Yesterday was Friday, and this case is on for trial Monday. I want to dispose of these matters without delay. I made it perfectly clear to you this past Monday, when you came in and said the family wanted you to represent Mr. McCloskey rather than Mr. Panzer, that you should not undertake the representation unless you were prepared to go to trial Monday. I made that abundantly clear on the record. You had the rest of the day, from

10 o'clock to 4 o'clock when you called my chambers, to confer with the defendant, to confer with Mr. Goldberg, to confer with Mr. Kenney. You then represented that you were ready to go to trial, and I assumed that was on the conditions that I set in the courtroom. I was very, very explicit. In fact, at one point I said to you I just want a yes or no answer from you: When you come back and tell me that you will represent the defendant, do you understand that it is on the condition this case will go to trial next Monday? You said yes, you did.

MR. MARTIN: Well, I did not --

THE COURT: And now I have a bunch of motions. We will proceed to dispose of them.

MR. MARTIN: If your Honor pleases, I was not under the impression that those were the conditions of my appearing, that I would have to --

THE COURT: I know, you kept trying not to answer my question. But the transcript of the hearing will say, "Please don't give me any stories; just give me a yes or no answer to my question." Reluctantly you came out and said yes. I don't think I could have been more clear that there would be no adjournment of this trial; that you had a perfect right to come in to represent Mr. McCloskey, but it could only be on the condition that there be no

adjournment of this trial and the trial would go forward on Monday. The record will speak for itself, Mr. Martin.

MR. MARTIN: If your Honor pleases, if I misled your Honor --

THE COURT: You did not mislead.

MR. MARTIN: -- I apologize for it.

THE COURT: The record is there. I am not going to embroider it, Mr. Martin.

MR. MARTIN: That is not my intention. At the time I discussed it with your Honor I said I didn't even know if I was retained or not.

THE COURT: And I told you that you could have until 10 o'clock the next morning to make up your mind. And Mr. McCloskey was brought over here for you to confer with him. Right?

MR. MARTIN: That's right.

THE COURT: And you were able to confer with Mr. Kenney or Mr. Goldberg. I even told you where to find Mr. Goldberg: in Judge Knapp's courtroom. There is no point in continuing any more. The record is there; it can be transcribed when, as and if it has to be.

Now let us dispose of your motions.

MR. KENNEY: Your Honor, I might add that the record has been transcribed. Unfortunately I left it down

in my office.

THE COURT: I don't have a copy of it.

MR. KENNEY: I can go down and get that.

THE COURT: You can show it to Mr. Martin later. If it was trascribed, there would be a copy in the reporters' office. After we are finished, I will have a copy picked up at the reporters' office.

Now let us see if we can take these things up seriatim. The first letter that was delivered yesterday afternoon at 2:30 merely asked in essence for a delay in your requests to charge and the memorandum of law, and that is granted to deliver in these chambers Tuesday morning at 9:30.

The second letter is something about the minutes of the hearing on September 17. In that regard I will point out to you that there was a transcript of the minutes of September 17. Mr. Hafetz obtained the minutes. Did you speak to Mr. Hafetz?

MR. MARTIN: I tried to reach his office.

THE COURT: There were only two people you could have called, Direnzo and Hafetz. Who are the other attorneys you called?

MR. MARTIN: I spoke to Mr. Goldberg. I got his file on December 5. I spoke to the United States

Attorney's Office; he did not have it.

MR. KENNEY: I have it now. I did not have it at the time. It is available for Mr. Martin to see it.

THE COURT: You can look at it, but you will see there is nothing in that transcript for a basis of any motions to be made in this case. What happened was that Mr. McCloskey's attorney brought up for discussion the psychiatric reports that had been submitted to the Court. I had appointed Dr. Abramson as the Court-appointed psychiatrist, and Mr. Goldberg on behalf of Mr. McCloskey designated Dr. Portnow to represent Mr. McCloskey. Dr. Abramson's report, of which you have a copy, I am sure, said the symptoms he presents are inconsistent with any psychotic conditions. His fabrication, his inability to understand, to answer questions, are crude and primitive. His diagnosis is malingering, psychopathic personality.

Dr. Portnow, the defendant's own psychiatrist, said that it was his feeling that he, meaning the defendant, chose at will those questions he wished to answer and those he did not. His report goes on to say, "With the exception of his affirmative answers to my questions about auditory hallucinations, however, there was no evidence that he is suffering from psychosis." He ends up by saying that at the

present time his symptoms fit no known psychiatric syndrome and must be considered to be exaggerated. The extent of this exaggeration could only be detected by prolonged observation in a hospital setting and sophisticated techniques such as sodium amytal interviews.

At that point I said that I would give the defendant the benefit of the doubt, not in so many words but this was my attitude, and that I would send him to Springfield for medical study. At that point Mr. McCloskey got up and said he wanted to plead guilty. I said under the circumstances I would not take such a plea, that I was not going to risk getting 2255 applications or his pleading guilty and then coming in and saying he was mentally incompetent to stand trial.

Consequently, no plea was taken to that indictment, which was the first superseding indictment. Instead Mr. McCloskey was sent to Springfield for full examination under the conditions which Dr. Portnow, his own psychiatrist, indicated should obtain in this case. We received from the Medical Center for Federal Prisons in Springfield a report dated November 13 which stated that they did administer sodium amytal to the defendant, as indicated and requested by his own psychiatrist. The report ends -- and I know you have a copy of this report --

"At that time he acknowledged that he was not incompetent to stand trial and had attempted to conceal his true mental capabilities because he felt he was fighting for his life. In my opinion Mr. McCloskey is fully aware of the nature of the charges pending against him and is capable of assisting counsel in his own defense if he chooses to do so."

Mr. McCloskey was then returned to this court, and I think he came back about the 19th of November -- is that correct, Mr. Kenney?

MR. KENNEY: I believe that is the date.

THE COURT: On the 20th he was brought into the court with Mr. Goldberg, at which point he indicated he wanted to plead guilty. It is my recollection that I directed Mr. Kenney and Mr. Goldberg and the defendant to confer. What happened thereafter I gather is included in this affidavit which you just submitted to me about ten minutes ago, Mr. Kenney, which I have not read yet.

In any event, it was on November 26 that I was informed that the negotiations looking toward a settlement seemed to be breaking down, and I had already informally contacted Mr. Panzer to see if he would be available to represent Mr. McCloskey. Mr. Panzer, who is a former Legal Aid assistant in this court and has practiced in this court extensively for years and is an able practitioner, said

that he was perfectly free and competent and ready to undertake this representation and be ready for trial on December 10.

That conversation which I am relating took place on Friday, November 23, because I did not want what I was afraid was going to happen, a constant delaying-tactic operation to prevent the trial of this case on December 10, and I wanted a lawyer available who could step in and handle the case.

Consequently, when I was informed on the 26th that Mr. McCloskey for one reason or another was not going to plead guilty, I directed he be brought to the court on the 27th with Mr. Panzer. I don't know whether Mr. Goldberg was there or not. Do you, Mr. Kenney?

MR. KENNEY: I don't recall. I don't think he was there at that time.

THE COURT: In any event, either on the 26th or the 27th Mr. Goldberg informed the Court that the defendant did not have the funds to hire another lawyer, and I designated Mr. Panzer that day to represent Mr. McCloskey, and Mr. McCloskey agreed to the representation. Then you came in last Monday, and here we are.

It is true that no formal plea to this second superseding indictment has been entered, but the second

superseding indictment is exactly the same as the first superseding indictment, except that John Doe is now denominated as John Turner, and Mr. McCloskey has pled not guilty to the first superseding indictment personally in the presence of counsel.

Consequently, all that is left is a formality of entering his plea of not guilty on Monday before we proceed, and this would not avail you of any additional time to attack the indictment, which had been attacked by Mr. Hopper, who was Mr. McCloskey's first privately retained attorney, then by Mr. Goldberg, who was Mr. McCloskey's second privately retained attorney. All those motions have been reviewed by the Court and disposed of.

I think that takes care of your second letter to me.

Your letters to Mr. Kenney I assume are for information purposes, and you can work those out with Mr. Kenney.

We now have your formal notice of motion, which I will denominate as the first motion or the omnibus motion, in which you have made seventeen motions for relief. The second I will call the second motion, which is a single motion for relief.

I will dispose of the second one first, because

the second one is actually included in the first and I don't know why you took the time to type the second one up. That will be denied.

As to the seventeen motions contained in the omnibus motion, I point out that Nos. 12, 13, and 14 are repetitive of what appears in the first eleven in some fashion or other. Starting with No. 1 of the omnibus motion, that motion is denied.

No. 2 in the omnibus motion is denied.

No. 3 in the omnibus motion is denied under a long line of decisions of the Court of Appeals of this Circuit.

No. 4 is denied.

No. 5 is denied.

No. 6 is denied.

No. 7. I will let you argue that if you wish to. I cannot understand even your papers which support it, unless it may be what occurred between the defendant and Mr. Kenney subsequent to November 20. Do you wish to elaborate on that?

MR. MARTIN: That would be one incident of it.

THE COURT: What?

MR. MARTIN: That would be one incident of it.

THE COURT: What else?

MR. MARTIN: Basically, may I be heard on it?

THE COURT: That is what I said.

MR. MARTIN: From what I have been able to gather from the files so far -- and I haven't been able to receive even all of the legal papers that have been incurred since June 11 of 1973 -- I find that the defendant was arrested and was held in $200,000 bail. There was a notice to reduce the bail, which was denied by your Honor. This defendant, 37 years of age, had never previously been arrested or convicted of a crime. He is married and has four children, owns a piece of property in New Jersey, and his not being out on bail -- or the size of thebail was tantamount actually to a denial of bail.

On top of that, when he was taken into the Federal House of Detention he has been chronically, from what I understand, held in either a segregated or maximum-security position wherever he has been in any of the houses of detention. That includes, from what I understand, the Federal House of Detention in West Street, I think a place in Nassau, and several of the other areas.

I understand that he has been questioned not only by Mr. Kenney but the FBI came in and questioned him.

THE COURT: When?

MR. MARTIN: I know, from what I understand, at least November 26.

THE COURT: That is after November 20, yes.

MR. MARTIN: And I understand there have been some other; I don't know when or where. I haven't been able to come up with enough factual details to know. But the one incident in which I spoke to Mr. Kenney, he and an FBI agent interviewed the defendant, not about the facts of this case but about other incidents that supposedly happened going back over a period of years. And the negotiations that were taking place out of sight of counsel, with no counsel available, and in my opinion with the defendant not being legally represented at that point, there was much pressure put on him, not about this case, not plea bargaining in this case, but about other incidents going all the way back.

THE COURT: That was part of the negotiations.

MR. MARTIN: What negotiations? The plea bargaining has nothing to do with this case. This was pressure from an outside agency of the Government, the FBI, which is not involved in this case. It is postal inspectors.

THE COURT: I assume Mr. Kenney will answer you, Mr. Martin.

MR. MARTIN: The defendant was also taken physically -- I understand before he was arrested he was about 165 pounds and in relatively good health. He is now

at least a physical wreck from an obvious standpoint. I have spoken to his wife. And she tells me he has lost at least 40 pounds, he is harrowed and racked looking. I understand he has been on medicine, that he hasn't voluntarily wanted to take it; he has a physical tremor. When he was out of the hospital, from what I understand, in Springfield, he was thrown into what they call the hole out there, or the maximum security of it, confined and received rather strange and tight treatment out there; was given medicine against his wishes and over his protests and with no signature, with no approval or consent on his part.

I think from the time that your Honor sent him out for observation he really has had no legal effective representation. His wife has paid $15,000 for legal representation, from what I understand, and from the time he went out to Springfield I don't think there has been many interviews with the attorneys.

THE COURT: Wait. When you say he was in Springfield, there could be no interviews with the attorney.

MR. MARTIN: No, I say from the time he was sent to Springfield up until now.

THE COURT: You have to exclude that, the time he was in Springfield. He was sent there for medical observation, because he claimed or gave the impression he was

incompetent to stand trial. There is no point of sending lawyers from New York to Springfield to confer with him.

MR. MARTIN: So anyway when he did come back I understand Mr. Goldberg had made arrangements, he was actually active in another case downstairs, rather involved in a lengthy trial. I obtained the file from Mr. Goldberg, and there are many gaps in it that I haven't been able to fill in information on. I didn't obtain that until December 5, about midway during the day. I had been trying to get it for two days and wasn't able to obtain that file. I called Mr. Kenney's office. Mr. Carey went down and went through the file, and we have been trying to get copies of all of the papers that Mr. Kenney felt he could release. Mr. Kenney said we would have to notify him as to the specific papers we wanted, and then make arrangements for it. So we have been negotiating that thing out so I could at least have the available legal papers.

When Mr. Goldberg was relieved from the case or got out of the case, as I said, a substantial fee had been paid. Mr. Panzer who succeeded him never interviewed the client. I can understand he wasn't able or didn't have copies of the papers, and from what my defendant's wife tells me she called Mr. Panzer's office on several occasions before the week and was told that he had been on trial all

week. This is right up through Friday, and this is when she came in to my office. It is my understanding --

THE COURT: Is that Friday, the 23rd?

MR. MARTIN: Friday, the 30th. -- that he hadn't been over to see him at that time, and they asked me to come in and look into it at that point.

When I met with Mr. Panzer, I understand Mr. Panzer did not have any conference with him outside of meeting with him in the courtroom I think the day he was appointed. When I spoke to Mr. Panzer and asked him what he had in his file, all he had was an appointment order that your Honor had signed in around November 23, I think -- or it was November 17, I forget the exact date, and he also had a copy of the statement of November 26 that Mr. Kenney, that I referred to before, that the defendant had signed with Mr. Kenney and the FBI agent.

I don't think actually as a practical matter he has had any effective legal representation toward the end of the case. I have not been able to even obtain a copy of the last indictment, that is, the 855. I am looking at that. I have read it, or Mr. Carey has read it, and as a practical matter I don't even think the defendant has seen it.

THE COURT: I don't know why you couldn't have

seen it the day you were in the courtroom.

MR. MARTIN: I went downstairs; I photostated all the records I could find.

THE COURT: On December 3?

MR. CAREY: The file down there in the courtroom, your Honor, was very incomplete. I don't know where the papers are.

MR. MARTIN: I photostated whatever was in there, and then Mr. Carey went down to Mr. Kenney's office the day before yesterday, I guess, and we have been trying desperately to get this stuff together.

THE COURT: If you could not find the indictment in the file on December 3, you couldn't have gone to Mr. Kenney's office in this building and gotten the indictment on December 3?

MR. MARTIN: We were running over with Mr. Goldberg trying to make arrangements to get the file and interviewing him. I went over with Mr. Goldberg during the lunch recess while we were waiting for Mr. McCloskey to come over, and he let me look at the file.

MR. CAREY: We were there in his office, your Honor, we had to sit and wait for him, he took the lunch break. He ran ahead of us; he kept us waiting in his office.

THE COURT: Mr. Kenney is in this building.

MR. CAREY: I am sorry. Mr. Goldberg.

THE COURT: I am talking about Mr. Kenney. If you can't find the indictment, you go up there and you get it in five minutes. I don't understand why you didn't have the indictment until yesterday.

MR. CAREY: I don't have it yet.

THE COURT: You don't have it yet?

MR. CAREY: I don't have a copy yet.

THE COURT: Go ahead. Next point.

MR. MARTIN: Anyway the defendant himself I don't think was adequately --

THE COURT: All you had to do was come up here to my chambers and get it.

MR. MARTIN: I have been negotiating with Mr. Kenney.

THE COURT: What is there to negotiate to get a copy of the indictment?

MR. MARTIN: I asked Mr. Kenney to let me make copies of everything in the file, and we had a particular request for particular papers.

THE COURT: I will go back again and make my point. On December 3, the first day you were here, the first thing you want is the indictment. There are two of

you, you and your colleague. If you could not find it in the file on December 3, you could either go to Mr. Kenney's office -- and I can't believe that he would refuse to give you a copy of the indictment --

MR. MARTIN: I didn't specifically --

THE COURT: -- or if you came up here you would have gotten a copy of the indictment.

MR. MARTIN: I didn't specifically ask him for a copy of the indictment.

THE COURT: Let us go on, then.

MR. MARTIN: I had two copies of indictments, but they weren't the last indictment.

THE COURT: Go ahead.

MR. MARTIN: I wasn't aware of that even at the time. I feel that he had no legal representation at the end. I think the overall pressure that has been put on him, the overall circumstances here, has so clouded his position that he really is not ready for trial.

I am not asking your Honor to delay the action so much. I think the action should be severed. He has not been arraigned on this indictment; he has not made a plea under the indictment.

THE COURT: I pointed out already that this is a formality in view of the fact that the superseding

indictment, with the change of the name of John Doe --

MR. MARTIN: Your Honor, that may be so, but it should be studied and a motion made regarding it.

THE COURT: Mr. Goldberg had all the time in the world and he did make such motions and Mr. Hopper made motions.

MR. MARTIN: On this?

THE COURT: It is the same indictment; it does not change. It is a superseding indictment with a name change; no substantive change regarding your client. That does not give you a chance to start all over again.

MR. MARTIN: I mean there must have been some new testimony before the grand jury or something must have happened before the grand jury.

THE COURT: It was to identify Mr. John Doe. Isn't that true, Mr. Kenney?

MR. KENNEY: That is correct, your Honor.

MR. MARTIN: But whatever, I think we would be entitled to at least investigate it and make motions regarding it.

THE COURT: It is the same thing. You are just wasting time, Mr. Martin.

MR. MARTIN: Your Honor is telling me that. I don't even have access to the papers. I have been trying to

get, right now I have been trying to get the minutes from the 17th. Now, your Honor told me what his recollection of the 17th is. From some of the information I have had, it is set forth in the papers what our position was. I think not even having that available is very prejudicial, and it is impossible --

MR. KENNEY: May the record reflect, your Honor, that I am handing Mr. Martin the minutes of the 17th. I would like to have them back after he is finished.

MR. MARTIN: Can I make copies of it?

MR. KENNEY: Certainly.

MR. MARTIN: Basically I don't think the defendant is in a position to go to trial. As far as even getting the legal papers, it has been a massive, almost impossible task, let alone the physical investigation of witnesses, which I have been trying to do. I have interviewed the defendant on about -- we spent maybe about four or five hours with him,since I have been appointed, over in West Street and in the court. I have been working compiling these motions, which I think have merit. What I am really asking your Honor to do, I think, so that the trial can go on, is to sever the defendant. I think the overall actions here have been so contaminated with some of the defendants pleading guilty, they are going to be witnesses, possible admissions --

THE COURT: It happens in every case in this court.

MR. MARTIN: But in view of all the circumstances, you know, you have to take everything into consideration, my feeling --

THE COURT: But you are leaving one thing out: that your client has been found to be a malingerer by psychiatrists appointed by you or indicated by you, by the federal government, and by Dr. Abramson, an outstanding psychiatrist in this town appointed by the Court. And I made that clear. I don't want any more attempts to put this trial over. The background does not sustain your position.

MR. MARTIN: If your Honor pleases, I can understand --

THE COURT: Mr. Hopper made motions. They are on record. I decided them. Mr. Goldberg made additional motions. He came in and said the defendant is entitled to a lawyer of his own choice,"even though he picked Hopper, he now wants me." So instead of trying the case in the summer when I was ready to try it, it was put over until September, and at that point we started to get Mr. McCloskey's indications around Labor Day that he wasn't in good condition. And that is the first time his wife complained: the day after Labor Day. Immediately psychiatrists

were appointed. Now the reports come back that he is a malingerer. So he must be charged with the delay in this case.

You reach a point,you know, where you can't keep giving in.

MR. MARTIN: If your Honor please, I can see your Honor's wish to proceed --

THE COURT: And the record up to date.

MR. MARTIN: -- with haste and with the record up to date.

THE COURT: No haste. I was ready to try the case in July. This is now December. That is not haste, is it, Mr. Martin?

MR. MARTIN: No, it is not haste, your Honor. Well, I can sympathize with your position of wanting to proceed with the case. It is a capital case. The defendant is charged with rather serious crimes. I think in the interest of justice it is certainly important that he be given every opportunity to be properly represented. I think essentially the record will bear me out that as a practical matter, in the preparation of this case, there has been literally no preparation for trial. I haven't been able to find anything. So it is incumbent upon me to start fresh as of the 3rd when I was appointed. And even in those

few days, instead of getting absolute cooperation from Mr. Panzer, he evidently wasn't even able to get the file, so Mr. Panzer had nothing to give me. But it took me until December 5 to get the file from Mr. Goldberg, with a stipulation that copies would be made and "send me a check for $15," to which we had to say, "Yes, please, we'll send it later." I had to have my office do that.

As I said, I didn't think it should have been, but we have been negotiating with the U. S. Attorney to get copies of the public records so as to expedite this. I am finding most of this out from the stuff I photostated or the judgment dockets. Many of these things there is no record of on the public dockets. I said, "Please get me the minutes." I asked Mr. Kenney. I said, "Please get me the transcripts and the minutes so I will know what happened, so I will have some way of proceeding." Even to analyze the legal stuff in here, I am just about to come to that now. And I have been running around, I have been literally working eighteen to twenty hours a day, both legally -- I have an associate over doing all the research now, as much as we can conceivably; as we reach each point, he is out researching it. I have been running around to the scene of the crime; I have been interviewing witnesses, potential witnesses; but literally we have just run out of

time. There is just no way of doing it.

Now, had there been preparation for the case by the previous attorneys, conceivably it may have made life easier. But there was none. There is no prospective charges, there is no memorandum of law, there is no factual background on witnesses. Nothing. So that literally this was as if I was initially in it.

Then it was ascertained that there wasn't even a formal arraignment on this particular indictment. Your Honor tells me there have been motions made on the indictment. That I don't even know about. I haven't seen all of the orders on it. Essentially it is as if I came in from the start. I am doing the best I can, and if your Honor forces me to proceedon Monday, of course I have no choice and I will, because I respect your Honor's position and conceivably I may be subjective representing a client. I concede this is a possibility. But it is a very mountainous job, the physical time involved, multitudinous details involved, the factual situation, the legal situation.

Mr. Carey has assisted me; I have three secretaries working; I have an associate at 230 Broadway who has been in the library since. I have been running around crazily. I tried to hire the investigator that I usually use on cases, a man by the name of Jack Tanner. He

has been actually engaged now on a malpractice civil case some place and he is going full tilt until Monday. I haven't been able to use him.

As a result, I have been trying myself to cover the physical investigation as much as possible. I have been trying to get photographers to go at the last minute over the weekend, and they are going now. But it is all a hit and miss. You know, I will be able to be in a position conceivably to try to try the case, but I think that in justice to the defendant and in justice to the Court more than just a procedural trying of a case is important; I think adequate preparation is essential, even to an understanding of the case and to obtaining a thorough knowledge of the case, both legally and factually. That I don't have. We are trying to absorb in the best possible way.

If your Honor chooses to say Monday we go, of course we are going to go. I think we are going to go under a tremendous handicap, and I think it is going to be very unjust to the defendant.

THE COURT: Mr. Kenney?

MR. KENNEY: Your Honor, my understanding is that Mr. Martin was addressing himself to his motion to --

THE COURT: No. 7.

MR. KENNEY: No. 7.

THE COURT: We might as well put No. 8 in there at the same time, because he has made some mention of it in his oral statement.

MR. KENNEY: As your Honor knows, Mr. Martin comes in as the fourth attorney in this case and under the representation, as I understand it and as I think the record will make clear, that he would be prepared to go to trial seven days after he came in.

MR. MARTIN: Excuse me for just one moment. I just --

THE COURT: No, let him finish.

MR. MARTIN: I am sorry.

THE COURT: Nobody interrupted you.

MR. MARTIN: I am very sorry.

MR. KENNEY: And having had one day to confer with myself, Mr. Goldberg, Mr. Panzer, his client and his client's family to determine whether he could in fact be ready in that period of time.

Mr. Panzer visited me twice and spent over an hour on one occasion in my office discussing the facts of the case in preparing himself to go to trial, reviewing parts of my file. So that I just would like to put on the record that he was active. Although I don't know in fact whether he was on trial or not, he was in my office in

attempting to prepare this case before Mr. Martin came in.

On Tuesday or Wednesday, the 4th and 5th of December, Mr. Carey came to my office. Mr. Carey and Mr. Martin had asked if they could see my legal file. I had witnesses in the office, and I gave Mr. Carey this file, which I have in my hand, plus an additional file containing all of the pretrial motions, excluding Mr. Goldberg's motions, which are in this file.

These which I refer to as our legal file contain also all the in camera affidavits which were pinned closed, interview sheets, applications to the Court of Appeals for bail, the designation sheet for indictment, early complaints, and other matters which are not related directly to Mr. McCloskey, legal papers filed by other defendants, Mr. Rippy and so forth, which are not directly related to Mr. McCloskey's case either.

Mr. Carey spent, I would estimate -- although correct me if I am wrong -- two hours or more in the reception room, reviewing --

MR. CAREY: In your reception room.

MR. KENNEY: -- this file.

THE COURT: And they had all the prior motions in this case?

MR. KENNEY: They had at the time Mr. Goldberg's

file, I believe, and Mr. Carey called me later that day and asked if I would make a copy of both of these files and give them over. I frankly felt that it was a little burdensome to be making copies to that extent, and I said that I would make copies of any papers relating to McCloskey which they were missing and get them over to them immediately. I did not find out until just now they did not have a copy of the indictment.

I think, frankly, your Honor, the claim that they have been negotiating to receive papers from the United States Attorney's Office is nothing more than a ruse to attempt to say they are not prepared to go to trial.

With regard to Point No. 8 in the first motion, since this affidavit by myself was just recently served, I will use it as a guide to review the facts in that situation, I think, if I may, your Honor.

I think that McCloskey returned from Springfield, Missouri, around the 14th or 15th of November or earlier, because he was to be here to go to trial on the 17th of November. And he was here, and Mr. Goldberg saw him. That date was adjourned, because Mr. Hafetz was actually engaged on trial in the Bronx.

THE COURT: In another murder trial.

MR. KENNEY: On the 21st of November, at Mr.

Goldberg's request, I had Mr. Vincent "Mike" McCloskey to my office -- as you know, he is in custody -- and Mr. Goldberg. Mr. Goldberg indicated that Mr. McCloskey was interested in pleading guilty. The Government said that it would accept a plea of second-degree murder in satisfaction of the indictment on the following grounds: that Vincent McCloskey through his attorney would make a full statement of cases in which he would either give information or testify to events himself; that at that point if the Government was satisfied that his cooperation was full and complete he would then be placed before a grand jury and questioned about these separate incidents, after which the Government would consent to a guilty plea.

On the other hand, if the Government was not satisfied with the truthfulness and frankness of his representation, it would simply reject McCloskey's offer. If the offer were accepted, he would not be prosecuted for any crime which he told us about. However, if the offer was rejected, what he said could be used against him.

I remind the Court at this point that it was the Government's suggestion, as is the normal case, that this be done with the defendant's attorney in a list of cases, so that there was no direct confrontation between the Government and the defendant. However, McCloskey and his

lawyer, Mr. Goldberg, decided that they would prefer to have Mr. McCloskey tell the Government lawyer himself what cases he was involved in rather than have the intermediary of the attorney present a list, and in fact that Mr. Goldberg would not be present. Mr. Goldberg asked Mr. McCloskey in my presence if this was acceptable to him, and he said that it was.

I point out in my affidavit at this point McCloskey initiated a conversation in which he asked questions about the details of the present case. What he was interested in primarily were people who were cooperating with the Government and whether the Government knew of the full participation of those people or whether those people were misleading the Government and placing the blame fully on Mr. McCloskey.

We did not ask Mr. McCloskey any questions either to the present crime or other crimes at that time.

On November 23, which was a Friday, 1973, McCloskey was brought to my office without his attorney pursuant to this agreement, and at that time Mr. Kivit and Mr. Shatzel were present -- they are both United States Postal Inspectors -- and in accord with the agreement Mr. McCloskey was questioned with regard to how the contents of the postal truck would be disposed of in this crime, this

being in our opinion a separate crime. We were interested in knowing who was going to fence these things, frankly. He gave answers with regard to that.

However, he stated that he did not want to answer questions with regard to any other crimes which were not related to the postal offenses or the United States mails, and that he wanted to have an FBI agent whom he knew, William Kelly, present, and he did not want to have postal inspectors present when he talked about crimes which he felt were within the jurisdiction of the FBI and not the Post Office. So the discussion was terminated on that day.

That was in the morning. At 12:30 p.m. Mr. Viviani of our office and myself visited Mr. McCloskey in the lockup, because we wanted to determine what his understanding of the agreement with the Government was, just to assure ourselves that he had a full understanding and that we had the same understanding.

We asked him what his understanding was, and he said that he understood that in return for his full cooperation he would receive -- or the Government would consent to a second-degree murder plea in this case. McCloskey said at that time, I point out in the affidavit, he had no information about murders or assaultive crimes. This is something that is probably beside the point, but we

were interested in knowing, since we were dealing directly with the defendant, whether he was going to pop up and say he knew about a murder or something else which we might be sorry later we included in this agreement. He said he had no such information.

I myself told him that his receiving a second-degree murder plea would be dependent on the list of crimes which we were preparing and his statements about them, and ultimately our determination whether he was being frank and truthful or whether he was holding things back. McCloskey answered that he understood that and that he would tell the Government everything.

On that same day I prepared a written statement, which is attached to this affidavit and marked Exhibit A, which I then read to Mr. Goldberg on the telephone, setting forth in substance what this agreement was. Mr. Goldberg said that he agreed to that, that in substance it was what the Government's agreement with McCloskey was, that he also said he did not feel it was necessary for him to be present when McCloskey read and signed this agreement.

So on the 26th of November, Monday morning, I had Mr. William Kelly in my office -- and I might add that the reason the FBI was not there earlier was that we were preparing and accumulating a list, a compilation of

information in the files of the Federal Bureau of Investigation, other agencies, with regard to Mr. McCloskey and what we believed his activities to have been in the past, so we would have something to ask him questions about.

On the 26th I handed Mr. McCloskey this statement, he read it, he said he understood it, and he signed it. He was then interviewed by myself and Mr. Kelly of the FBI. The statement is just one page, your Honor.

THE COURT: It is part of the record, isn't it? There is no need to read it. You served a copy, I assume, on Mr. Martin?

MR. KENNEY: That is correct. I just point out that in the statement Mr. McCloskey says that he is signing this in the absence of his attorney but with his knowledge and McCloskey's full consent.

THE COURT: All right. No. 7 is denied.

MR. MARTIN: Your Honor, may I just interject a couple of remarks?

THE COURT: No. I gave you full opportunity for twenty minutes to talk.

MR. MARTIN: Some of this is new material, your Honor, to me. Some of it is new material.

THE COURT: What is it?

MR. MARTIN: I would just like to point out that

I just received the affidavit here and haven't had a chance to read it.

I also should like to point out to the Court that around the time of these meetings that Mr. Kenney just spoke about with the defendant personally that Mr. Goldberg either had been or was in the process of being relieved as the attorney.

THE COURT: No, he had not been relieved yet.

MR. MARTIN: What I am asking is for a hearing to inquire into all of the facts.

THE COURT: Application is denied.

MR. MARTIN: Into a hearing on all of it.

THE COURT: Application is denied.

MR. MARTIN: Respectfully except.

THE COURT: No. 8 is denied.

MR. MARTIN: Respectfully except.

THE COURT: Motion No. 9 is denied. You are not entitled to their investigative reports, Mr. Martin.

MR. MARTIN: Respectfully except.

THE COURT: Motion No. 10 is denied.

MR. MARTIN: Respectfully except.

THE COURT: You have not even submitted to me any basis for such a claim. I don't know what newspapers carried about this.

MR. KENNEY: This motion was made and denied in August as well, your Honor.

THE COURT: That is my recollection too. Many of these things are repetitious, things which have already been denied in this case.

MR. MARTIN: If your Honor pleases, I would like to point out we again are dealing with a new indictment.

THE COURT: I have pointed out it is the same indictment. There are no new charges against your client.

MR. MARTIN: It was evidently a new grand jury convened.

THE COURT: For the purpose of changing a name.

MR. KENNEY: It was the June regular grand jury, your Honor.

THE COURT: That is what I thought.

No. 11. You have made some concessions on it, have you not, Mr. Kenney, in the prior motions, and those are binding on all the defendants.

MR. KENNEY: That is correct. I might point out that I have given Mr. Martin copies of letter agreements, I guess they would be called, between the Government and Mr. Meyers, Mr. Mann, Mr. Crawford, and I point out that with regard to Paul Crawford and Harry Johnson the Government has an agreement that if they should testify the Government

would call that cooperation to the attention of the Court at the time of sentence and, in addition, we will dismiss the open counts as to them in the indictment at the time of sentence.

MR. MARTIN: May I ask where those papers are?

MR. KENNEY: Yes. They are these two papers before you right here.

MR. MARTIN: I haven't seen them yet.

MR. KENNEY: I point out those letters have not been turned over to other defense counsel. They will be turned over on the morning of the trial.

THE COURT: On Monday, as I understand it. He was to turn them over Monday morning. You are getting them Saturday morning.

No. 12 is denied.

Nos. 13 and 14, as I say, are repetitious of what appears above.

I will hand down a written opinion sometime Monday or Tuesday to buttress the rulings I have just made.

MR. MARTIN: For the record, I would like to except to all your Honor's rulings. I would like to make one statement: It was not my impression that -- and if I misled the Court and misled Mr. Kenney, I apologize, your Honor -- I would be ready for trial, because I had not at

the time that your Honor is referring to even interviewed the defendant.

THE COURT: That is why I gave you a day.

MR. MARTIN: I had no idea what would happen. Now, I did order the minutes of the day I was appointed before the Court, and at that time I made no representations to the Court.

THE COURT: I am not talking about Tuesday; I am talking about Monday.

MR. MARTIN: At that time I was asking if we could represent him. The reason I did step in --

THE COURT: Do you have Monday's transcript? Since you have ordered Tuesday's, I assume you ordered Monday's too.

MR. MARTIN: No, I didn't, because I didn't know whether I was going to be in the case at that time.

THE COURT: I think Monday's transcript is the one I am referring to.

MR. KENNEY: I have Monday's transcript. I can go and get it.

THE COURT: We will get our copy downstairs. You can keep yours. You can show it to Mr. Martin when you leave.

MR. MARTIN: If your Honor please, I would like

to point out the main reason I stepped into the case at the behest of the defendant is because after looking at what happened and from what I heard it was my feeling that he had not been adequately prepared in the case, and I thought I would step in to do whatever conceivably might physically be done under the circumstances in view of those happenings.

THE COURT: Mr. Goldberg represented to the Court, I think in October, was it not, Mr. Kenney, that he had done investigative work during the summer.

MR. KENNEY: That is correct.

THE COURT: And he made these motions, which I had to rule on, so I know he did that. He must have done some work to make the motions. He made quite a few motions, as I recall.

MR. KENNEY: I might add, your Honor, that he hired the Pinkerton Detective Agency to do investigative work. I know that because they contacted the United States Attorney's Office after they were hired. He investigated Mr. Turner and other potential Government witnesses.

MR. MARTIN: If your Honor pleases, there was an investigation to ascertain what previous records, if any, the defendants had. That was the extent of it.

THE COURT: He did not have to go that far.

Mr. Kenney would have told him that.

MR. MARTIN: That was the extent of the Pinkerton investigation. I have a copy of it. That was to see whether there were any prior records.

THE COURT: All right. Gentlemen, I have other work to do today.

MR. MARTIN: Could I just have one more second, your Honor? The defendant's wife is outside. If your Honor wishes, I could have her come in and advise your Honor as to the amount of money she has paid as legal fees.

THE COURT: That is not a problem before the Court at this time. That is a problem between her and you and Mr. Goldberg. I am not going to get involved in that.

MR. MARTIN: Because she had advised that she paid $15,000 to be represented. This is before I came into the picture.

THE COURT: I have no interest in that problem. That is a problem between her and Mr. Goldberg.

MR. MARTIN: I mean, there was some question --

THE COURT: If she wants to sue Mr. Goldberg, that is her problem.

MR. MARTIN: I understand there was some question that the reason for the substitution was that she was unable to pay or something. I thought I saw something like

that in the minutes.

THE COURT: I assume Hopper was privately retained and paid a fee.

MR. MARTIN: He had been paid five thousand, from what she tells me.

THE COURT: And then Goldberg comes along and gets paid a fee.

MR. MARTIN: Fifteen thousand.

THE COURT: I even offered to transfer my Part I assignment for Goldberg to remain in the case, on the theory that he lived with it a long time. That couldn't be done because there was no assurance that his trial before Judge Knapp would be over by the end of the year, and that is why I started to get another lawyer, either hire him privately or I would appoint one. Because I did not want this case to go any more. Mr. Direnzo is an attorney in this case, and he is active in five different courts at the same time; there is Mr. Hafetz, who has the same problem. You can't keep putting a case over that has been put over for six months to another point and then start trying to get other lawyers ready again. And I have other commitments too. Six months is a reasonable time. I could see that if I pressed for trial in July, when I wanted to try the case, a month after the indictment came down, that perhaps defendants could say

that their attorneys did not have a time to prepare the case. But the case was adjourned to September, adjourned to November, adjourned to December. No more.

MR. MARTIN: But that is not the defendant's fault, your Honor.

THE COURT: Yes, it is.

MR. MARTIN: That his attorney was not in a position to proceed on trial.

THE COURT: Yes, it is. Because if we had not gone through this malingering nonsense, we would have tried it on September 17 when Mr. Goldberg was free to try the case. It happens to be the date that Mr. Goldberg picked; is that right, Mr. Kenney?

MR. KENNEY: That is correct.

THE COURT: We were supposed to start the 10th, and he asked to put it off to the 17th. And if we did not go through all the psychiatric matter we had to go through, at his instance, this case would have been tried September 17.

MR. MARTIN: But the superseding indictment only came down that day, if your Honor pleases.

THE COURT: It was a change of name, for the fourth time, Mr. Martin, not a change of substance; no change in the charges against your defendant; no additional proof.

MR. MARTIN: It was a new defendant.

THE COURT: They found out who the John Doe was.

MR. MARTIN: Which may have been significant.

THE COURT: Your defendant knew who the John Doe was.

MR. MARTIN: Which may have had significance, your Honor.

THE COURT: He knew who the John Doe was the same as the other defendants.

MR. MARTIN: I don't know whether he did or not.

MR. KENNEY: I point out we filed a bill of particulars pointing out who John Doe was substantially before that indictment.

MR. MARTIN: Your Honor, the man is charged with murder-first.

THE COURT: I know that.

MR. MARTIN: A capital crime.

THE COURT: I know that, and I think I have been very patient.

MR. MARTIN: But if the attorney was not in a position to go to trial who had been acquainted with the case, and was then relieved, two weeks approximately before the date of trial, two or three weeks before the trial, and somebody new had to come in, that places an awful burden on

the attorney.

THE COURT: Not an accomplished attorney, and Mr. Panzer is an accomplished attorney. That is why I started to get him in advance, so I would not be met at the last minute by Mr. McCloskey changing his mind about cooperation and not pleading and then coming along and saying, "OK, Judge, on December 9 I have changed my mind, I am not going to plead guilty, but now I need time to adjourn the trial to prepare for it" -- which means I then have to tell Mr. Direnzo, who has held off judges in other courts because of the firm date here, "Oh, I am now free but you can't put me down for January or February"; I have to get Mr. Hafetz, who has done the same thing. When do I get a trial date?

MR. MARTIN: I understand your Honor's concern with a trial date.

THE COURT: Wait a second. When do I get a trial date? When you are ready? And when you are ready, does that mean Mr. Direnzo can come in and Mr. Hafetz can come in?

MR. MARTIN: If your Honor please, I understand the difficulty with the Court's docket and the timing, but I think this is a substantive problem. Mr. Panzer had not even interviewed the defendant from what I understand.

THE COURT: Mr. Martin, this case would have been tried on September 17 if it were not for your client.

MR. MARTIN: I am not in a position to say that, your Honor; I wasn't here at the time.

THE COURT: I was.

MR. MARTIN: And there must have been some question concerning his competence, you know, to have even been sent to the institution. I imagine there would have been a question.

THE COURT: I did that so I would not have a 2255 thereafter. I could have ruled on Dr. Portnow's, your client's own psychiatrist.

MR. MARTIN: I don't think he used the word "malingerer."

THE COURT: No, he didn't use the word "malingerer," and I would not think so, because he was hired by the defense. And I assume doctors shade a little bit, depending on who hires them. He says, and I will repeat it -- you have this, so why should I read it to you.

MR. MARTIN: I understand he only examined him for ten minutes, both of these doctors, in West Street, from what the defendant said. He said, "They looked at me for ten minutes," that's all he said, across the table.

MR. KENNEY: Dr. Abramson has examined him twice.

THE COURT: Twice, not once.

MR. MARTIN: Yes, but he said a ten-minute interview across the desk. He said this is the extent of the interview.

THE COURT: "At the present time his symptoms fit no known psychiatric syndrome and must be considered to be exaggerated." That is your psychiatrist. And Dr. Portnow is a leading psychiatrist in this town, as you well know.

Gentlemen, I have a lot of other things to do.

MR. MARTIN: I respectfully except to all of your Honor's rulings.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
-v-	73 Cr. 855
THOMAS JOSEPH CARROLL, JOHN TURNER, a/k/a "Jack", VINCENT McCLUSKEY, a/k/a "Mike", ROBERT E. RIPPY, a/k/a "Ripp", CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN,	
Defendants	

Before:

HON. CHARLES M. METZNER,
District Judge

New York, New York
September 17, 1973--10:35 a.m.

APPEARANCES:

PAUL J. CURRAN, ESQ.,
United States Attorney for the
Southern District of New York
BY: JOHN J. KENNEY, ESQ. and
MICHAEL Q. CAREY, ESQ.,
Assistant United States Attorneys

MICHAEL P. DIRENZO, ESQ.,
Attorney for Defendant Carroll

JACK KAPLAN, ESQ.,
Attorney for Defendant Turner

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JAY GOLDBERG ESQ. and
DONALD A. HOPPER, ESQ.,
Attorneys for Defendant McCluskey

FREDERICK P. HAFETZ, ESQ.,
Attorney for Defendant Rippy

JAY GOLD, ESQ.,
Attorney for Defendant Chester Crawford

JOSEPH KLEMPNER, ESQ.,
Attorney for Defendant Paul Crawford

MURRAY MOGEL, ESQ.,
Attorney for Defendant Myers

ROBERT MITCHELL, ESQ.,
Attorney for Defendant Mann

MR. KENNEY: Your Honor, the Government is ready to proceed.

MR. DIRENZO: If your Honor please, before answering if I am ready, I understand there is a superseding indictment before your Honor upon which indictment the defendant will be called upon to enter a plea. Before the entry of that plea I would like to make a preliminary application, and the application is, if your Honor pleases, that since the acts charged in this indictment are acts for which the defendant Carroll could be equally tried in the State court as well as the Federal court, I, recognizing that each of the courts has jurisdiction over these circumstances, my basic motion is that by being tried in the Federal court he is being denied a substantial right, to wit that accomplice testimony standing alone could be sufficient to warrant a finding of guilty against this defendant.

I am familiar with the Rules, your Honor, but I wanted to perpetuate this for the record, that we now are informed that co-defendants in this case will be testifying against the defendant Carroll, and in view of that fact I think a substantial right, to wit, a basic concept in our State law, is being denied this defendant by trying him in this court and not in the State court.

THE COURT: Motion denied.

MR. DIRENZO: I respectfully except, your Honor.

THE CLERK: Mr. Direnzo, do you have an application to make with respect to --

MR. DIRENZO: I have already read the indictment, if your Honor pleases. The defendant waives the formal reading of that indictment and desires to enter a plea of not guilty.

THE CLERK: Thomas Joseph Carroll, please rise.

Mr. Carroll, the gentleman sitting on your right, Mr. Direnzo, is your attorney?

DEFENDANT CARROLL: Yes, sir.

THE CLERK: Mr. Carroll, do you waive the detailed reading of this indictment and plead not guilty?

DEFENDANT CARROLL: Yes.

THE CLERK: You may be seated.

Is counsel for the defendant John Turner here?

MR. KAPLAN: Yes.

THE CLERK: Mr. Turner, will you please rise.

Mr. Kaplan, do you have an application to make with respect to your client?

MR. KAPLAN: If your Honor please, I was unavoidably detained on my way to court. I have not had a chance to read the superseding indictment. If we may have a second call I will read it while the other defendants are being --

THE COURT: Didn't you furnish Mr. Kaplan with a copy of this indictment last week, Mr. Kenney?

MR. KENNEY: I don't know whether I did or not. If he doesn't have a copy --

THE COURT: Second call.

THE CLERK: Vincent McCluskey, also known as "Mike"--

THE COURT: I will put that over for second call in view of the reports we have just received.

THE CLERK: Is counsel for Chester Crawford ready?

MR. GOLD: We have an application, your Honor.

It is the wish of my client to plead guilty to second degree murder as a lesser included offense of the charge contained in Count 2 of this indictment.

THE COURT: I will do the allocution after I have gone thru the pleas.

THE CLERK: Counsel for Paul Crawford ready?

MR. KLEMPNER: We are ready, your Honor.

We will waive the detailed reading. It is my client's desire to enter a plea.

THE CLERK: The gentleman standing on your right, Mr. Crawford, is he your attorney?

THE COURT: Just a moment.

THE CLERK: Gentlemen, be seated for a moment.

Is counsel for Robert E. Rippy, also know as "Ripp"

ready?

MR. HAFETZ: Last week the new indictment was furnished to us. At that time Mr. Rippy entered a plea of not guilty on the superseding indictment. The defendant wishes to proceed to trial today.

I would like to make a statement for the record, if I may, Judge:

The prosecutor has communicated to me an offer for Mr. Rippy to plead guilty to Count 1, the conspiracy count of the indictment, in full satisfaction of all charges if Mr. Rippy would testify, if the Government chooses to have him testify. I fully discussed this with my client and my client wishes to proceed to trial.

THE COURT: All right.

THE CLERK: Is counsel for Paul Crawford here?

MR. KLEMPNER: As I indicated, Mr. Crawford waives a detailed reading of the superseding indictment. It is his desire to plead guilty, and that plea, I assume, will be taken at the appropriate time, your Honor?

THE COURT: What is the plea to?

MR. KLEMPNER: To the first count, the conspiracy.

THE CLERK: Is counsel for Geoffrey Matthews Mann ready?

MR. MITCHELL: If your Honor pleases, I was

assigned to represent the defendant Mann in 73 Criminal 606. I have since received a copy of 73 Crim. 855. May I be assigned to that case?

THE COURT: You are.

MR. MITCHELL: The defendant Mann will enter a plea of guilty to the second count of the indictment.

THE CLERK: You may be seated, gentlemen.

Is counsel for Terrence Dewey Myers ready?

MR. MOGEL: Counsel is ready.

THE CLERK: Do you have an application to make?

MR. MOGEL: Your Honor, Mr. Myers waives a reading of the indictment. He will plead guilty to murder in the second degree, the lesser included offense, the second count of the indictment.

THE COURT: Will the marshals take Mr. Carroll and Mr. Rippy back to the detention cell, please.

[Pause]

MR. GOLDBERG: I wanted to bring something to the Court's attention.

THE COURT: Wait until they take care of something else.

Are you ready, Mr. Kaplan?

MR. KAPLAN: I beg your pardon, your Honor?

THE COURT: Are you ready to plead Mr. Turner?

MR. KAPLAN: May I have one more minute, if your Honor please?

THE COURT: Mr. Goldberg, I will hear you.

MR. GOLDBERG: I have discussed the superseding indictment with my client this morning and he expresses a desire to plead guilty to murder in the second degree. If he is competent to stand trial that is his wish. If your Honor should find him not competent to stand trial then the offer stated to me by my client of course will not be acceptable to the Court.

THE COURT: I would like to put that off to the end of the proceeding.

You have both reports, do you not?

MR. KENNEY: I have one copy, your Honor.

THE COURT: I will return it to you. Please give it to me.

[Pause]

THE COURT: Mr. Kaplan?

MR. KAPLAN: You may take his plea.

Your Honor, we waive a detailed reading of the charges and plead not guilty.

THE CLERK: In the matter of United States of America versus John Turner, also known as "Jack", counsel, do you wish to make an application?

MR. KAPLAN: Well, first, for the pleading, we waive a detailed reading of the charges and plead not guilty.

THE CLERK: Mr. John Turner, the gentleman standing on your right, Mr. Kaplan, is he your attorney?

DEFENDANT TURNER: Yes.

THE CLERK: Do you waive a detailed reading of this indictment and plead not guilty?

DEFENDANT TURNER: Yes, I do.

THE CLERK: You may be seated.

MR. KAPLAN: If your Honor please, I have two applications.

The first application I have is for a severance on the grounds previously stated.

THE COURT: Mr. Kenney?

MR. KENNEY: No objection, your Honor.

THE COURT: Mr. Turner may be returned.

MR. KAPLAN: If your Honor please, my second application is for the transcription of trial minutes on a daily basis at Government expense.

THE COURT: Of this trial from which you are severed?

MR. KAPLAN: That's correct, if your Honor please. I must suppose that the same witnesses are going to testify at the Turner trial, and if the Government is going to have a

trial transcript available for its use at the Turner trial then he is entitled to the same treatment.

THE COURT: Prior to the start of the trial against Mr. Turner you will be furnished with a copy of the transcript. You will not receive a copy of this transcript on a daily basis.

MR. KAPLAN: So long as I receive it for use at the trial I will be content with your Honor's disposition.

THE COURT: I understand that we have guilty pleas for Chester Crawford, Paul Crawford, Terrence Myers, and Geoffrey Matthews Mann; is that correct?

I was requested, thru my law clerk, who received a request from counsel, that these allocutions take place in the courtroom but not in the presence of the defendants who have pled not guilty. That's why I have asked the defendants who have pled not guilty to leave the courtroom.

So that the record is clear, is that correct, Mr. Gold?

MR. GOLD: That was not a request of mine but I am content with the ruling.

THE COURT: Mr. Klempner?

MR. KLEMPNER: If your Honor please, it is my request that I passed on to Mr. Kenney that my client be permitted to plead guilty in chambers. He is nervous and he does not

speak well. That is his preference.

THE COURT: We will take him when no one is left.

MR. MOGEL: I have no objection.

THE COURT: Mr. Mitchell?

MR. MITCHELL: No objection, your Honor.

MR. HAFETZ: May I state an objection for the record. I do object to the procedure.

THE COURT: Mr. Chester Crawford, please rise.

Mr. Crawford, I understand that you have entered a plea of guilty to murder in the second degree as a lesser included offense in Count 2 of Indictment No.73 Criminal 855; is that correct, Mr. Crawford?

DEFENDANT C. CRAWFORD: Yes, sir.

THE COURT: Is Mr. Gold, the gentleman sitting to your right, your attorney?

DEFENDANT C. CRAWFORD: Yes, sir.

THE COURT: Have you discussed this indictment with Mr. Gold?

DEFENDANT C. CRAWFORD: Yes, sir.

THE COURT: Do you understand every accusation made against you by this indictment?

DEFENDANT C. CRAWFORD: Yes, sir.

THE COURT: Have you told Mr. Gold all the facts and surrounding circumstances known to you concerning these

accusations?

DEFENDANT C. CRAWFORD: Yes, sir.

THE COURT: Do you feel that Mr. Gold is fully informed as to such matters?

DEFENDANT C. CRAWFORD: Yes, sir.

THE COURT: Has Mr. Gold discussed with you any possible defenses you might have to the charges contained in this indictment?

[Pause]

MR. GOLD: He doesn't understand you, your Honor.

THE COURT: Has Mr. Gold discussed with you any possible defenses that you could have to defeat the charges contained in this indictment?

[Pause]

DEFENDANT C. CRAWFORD: Yes, sir.

THE COURT: Are you satisfied with the services of Mr. Gold in this case?

DEFENDANT C. CRAWFORD: Yes, sir.

THE COURT: Count 2 of this indictment charges that on or about the 5th day of April, 1973, in the Southern District of New York, you, along with Thomas Joseph Carroll, John Turner, Vincent McCluskey, Robert Rippy, Paul Crawford, Terrence Myers and Geoffrey Mann, unlawfully, willfully, knowingly, with malice aforethought and in the perpetration and

attempted perpetration of a robbery in violation of Title 18, United States Code, Section 2114, did murder and kill an employee of the United States Postal Service, to wit, William Hickey, while he was engaged in and on account of the performance of his official duties, to wit, the guarding of said United States mail truck.

I gather that you are pleading guilty to the lesser included offense of murder in the second degree which omits from its definition premeditation or the commission of a felony in the commission of which crime a person was killed.

Did you, with the people I just mentioned, conspire to steal mail from a mail truck?

DEFENDANT C. CRAWFORD: Yes, your Honor.

THE COURT: After January 1, 1973 and prior to April 5, 1973?

DEFENDANT C. CRAWFORD: Yes, your Honor.

THE COURT: In conjunction with that conspiracy, did you go to the vicinity of Wall Street in New York City on March 20, 1973?

DEFENDANT C. CRAWFORD: Yes, your Honor.

THE COURT: Did you meet with Thomas Carroll and Vincent McCluskey on March 22, 1973 in the vicinity of Fulton Street, New York?

DEFENDANT C. CRAWFORD: Yes, your Honor.

THE COURT: Did you meet with Thomas Carroll, John Turner, Vincent McCluskey, Terrence Myers, and Geoffrey Mann at Katz' Delicatessen on Houston Street, April 5, 1973?

DEFENDANT C. CRAWFORD: Yes, your Honor.

THE COURT: Did you have anything to do with the furnishing of guns to be used on the holdup that day?

DEFENDANT C. CRAWFORD: No, your Honor.

THE COURT: What did you do, Mr. Crawford?

DEFENDANT C. CRAWFORD: I participated in the robbery of the mail truck.

THE COURT: Did you know that any of the other individuals had guns?

DEFENDANT C. CRAWFORD: Yes, your Honor.

THE COURT: Did you know that they could have been used or intended to be used if necessary in that robbery?

DEFENDANT C. CRAWFORD: Yes, your Honor.

MR. GOLD: I don't like to interrupt, your Honor.

Lest there be a misunderstanding, I don't believe it is my client's wish to admit that there was any part in this plan which included the notion that should there be any resistance by this driver it was his understanding that that driver would be killed. That was not the understanding.

I believe what he is trying to tell your Honor is that he participated in this robbery knowing that in the

course of that robbery other participants would be using loaded weapons. That is his concession.

THE COURT: I think that's sufficient for the crime of murder in the second degree.

MR. GOLD: I agree with your Honor.

THE COURT: That's what I was trying to do without murder in the first degree creeping into these proceedings.

MR. GOLD: We are not pleading first degree murder.

THE COURT: I understand that, but I think we have sufficient allocution from what Mr. Crawford has told us. He would be guilty of murder in the second degree because he was part of a conspiracy and a murder, as a result, took place.

Do you have any suggestions, Mr. Kenney?

MR. KENNEY: Except to say that the Government's proof at trial would show that Mr. Crawford, Chester Crawford, passed guns in a paper bag to Mr. Myers and Mr. Mann.

THE COURT: That's your proof that you will offer?

MR. KENNEY: I believe he may have misunderstood your questions as to this point.

MR. GOLD: Your Honor asked whether he furnished the guns and he honestly answered no.

THE COURT: Did you pass the guns in a paper bag to two of your colleagues at that time?

DEFENDANT C. CRAWFORD: Yes, your Honor.

THE COURT: How old are you?

DEFENDANT C. CRAWFORD: Twenty-eight.

THE COURT: Do you understand that the maximum punishment which the law provides under your plea of guilty is a term of imprisonment for any term of years or for life?

DEFENDANT C. CRAWFORD: Yes, sir.

THE COURT: Do you understand that by pleading guilty the Court may impose the same punishment as though y had stood trial and been convicted by a jury?

DEFENDANT C. CRAWFORD: Yes.

THE COURT: Do you understand that at such a trial you would have a right to be confronted by witnesses produced by the Government to testify against you?

DEFENDANT C. CRAWFORD: Yes, your Honor.

THE COURT: Do you understand that on such trial you would have a right to cross-examine those witnesses?

DEFENDANT C. CRAWFORD: Yes, your Honor.

THE COURT: Do you understand that at such trial you would have a right to compel the attendance of witnesses to testify on your behalf?

DEFENDANT C. CRAWFORD: Yes, sir.

THE COURT: Has anyone attempted to influence you or to promise you anything to induce you to plead guilty to this count of the indictment?

DEFENDANT C. CRAWFORD: No, sir.

THE COURT: Have you given any statement to any law enforcement officer or Assistant United States Attorney concerning the offense charged in the indictment?

DEFENDANT C. CRAWFORD: No, your Honor.

MR. GOLD: May I correct that?

DEFENDANT C. CRAWFORD: I gave him --

MR. GOLD: He has, of late, given a statement to Mr. Kenney.

THE COURT: I will ask this of you:

Is your plea of guilty being made because you made those statements to Mr. Kenney?

DEFENDANT C. CRAWFORD: No, your Honor.

THE COURT: Were you represented by counsel at the time that you gave the statements to Mr. Kenney?

DEFENDANT C. CRAWFORD: Yes, your Honor.

THE COURT: Were you present, Mr. Gold?

MR. GOLD: I was present at the outset and during the negotiations, your Honor.

THE COURT: Were you advised, before you gave any statement to Mr. Kenney, of your right to remain silent?

DEFENDANT C. CRAWFORD: Yes, your Honor.

THE COURT: Were you advised before you gave any statement you could have counsel to advise you of your rights?

DEFENDANT C. CRAWFORD: Yes, your Honor.

THE COURT: I understand Mr. Gold was present, at least, in the initiation of such proceedings.

Mr. Gold, you may answer this question: Did you advise the defendant of his right to remain silent?

MR. GOLD: Yes, your Honor.

THE COURT: Is this application by you to plead guilty being made voluntarily and of your own free will because you are guilty and for no other reason?

DEFENDANT C. CRAWFORD: Yes, your Honor.

THE COURT: Do you use narcotics and marijuana?

DEFENDANT C. CRAWFORD: No, your Honor.

THE COURT: Mr. Gold, do you know of any reason why Mr. Crawford should no plead guilty as he has?

MR. GOLD: I do not, your Honor.

THE COURT: I will accept the plea.

As far as the sentence date, I will notify you, Mr. Gold, and you will notify Mr. Crawford. I have not fixed the date yet.

[Defendant C. Crawford was escorted from the court]

THE COURT: Mr. Myers, I understand that you wish to plead guilty to second degree murder as a lesser included charge, Count 2, of Indictment 73 Criminal 855; is that correct?

DEFENDANT MYERS: Yes, your Honor.

THE COURT: Is Mr. Mogel, the gentleman sitting to your right, your attorney?

DEFENDANT MYERS: Yes, sir.

THE COURT: Have you discussed this indictment with Mr. Mogel?

DEFENDANT MYERS: Yes, sir.

THE COURT: Do you understand every accusation made against you by this indictment?

DEFENDANT MYERS: Yes, sir.

THE COURT: Have you told Mr. Mogel all the facts and surrounding circumstances known to you concerning these accusations?

DEFENDANT MYERS: Yes, sir.

THE COURT: Do you feel that Mr. Mogel is fully informed as to such matters?

DEFENDANT MYERS: Yes, sir.

THE COURT: Has Mr. Mogel discussed with you any possible defenses you might have to the charges contained in this indictment?

DEFENDANT MYERS: He has.

THE COURT: Areyou satisfied with the services of Mr. Mogel?

DEFENDANT MYERS: Very satisfied.

THE COURT: This indictment charges in Count 2 that on April 5, 1973, you, along with Thomas Carroll, John Turner, Vincent McCluskey, Robert Rippy, Chester Crawford, Paul Crawford, and Georffrey Mann, unlawfully, willfully, knowingly, with malice aforethought and in the perpetration and attempted perpetration of a robbery in violation of Title 18, United States Code, Section 2114, did murder and kill an employee of the United States Postal Service, to wit, William Hickey, while he was engaged in and on account of the performance of his official duties, to wit, the guarding of said United States mail truck.

Mr. Myers, on April 5, 1973, were you with the gentlemen whose names I have just read to you?

DEFENDANT MYERS: Yes, I was.

THE COURT: Was the purpose of that gathering to holdup and rob a mail truck?

DEFENDANT MYERS: Yes, it was.

THE COURT: During the holdup was Mr. Hickey killed?

DEFENDANT MYERS: Yes, he was.

THE COURT: Were you the person who shot the gun?

DEFENDANT MYERS: Yes, I was.

THE COURT: Had you also, prior to that time, agreed with Mr. Carroll, Mr. Turner, Mr. McCluskey, Mr. Rippy, Mr. Chester Crawford, Mr. Paul Crawford, and Mr. Geoffrey Mann

to rob that mail truck?

DEFENDANT MYERS: Yes, sir.

THE COURT: Did you meet with Chester Crawford and Paul Crawford on March 20, 1973, in the vicinity of Wall Street?

DEFENDANT MYERS: Yes, sir.

THE COURT: Did you meet with Mr. Carroll, Mr. Turner, Mr. McCluskey, Mr. Chester Crawford, and Mr. Geoffrey Mann at Katz' Delicatessen on April 5, 1973, on Houston Street?

DEFENDANT MYERS: Yes, sir.

THE COURT: How old are you?

DEFENDANT MYERS: Twenty-six.

THE COURT: Do you understand that the maximum punishment which the law provides on your plea of guilty is imprisonment for a term of years up to life, up to and including life?

DEFENDANT MYERS: Yes.

THE COURT: Do you understand that by pleading guilty the Court may impose the same punishment as though you stood trial and were convicted by a jury?

DEFENDANT MYERS: Yes, sir.

THE COURT: Do you understand that by pleading guilty you waive your right to a trial by jury of the charges of the indictment?

DEFENDANT MYERS: Yes, sir.

THE COURT: Do you understand that in such a trial you would have a right to be confronted by witnesses produced by the Government to testify against you?

DEFENDANT MYERS: Yes, sir.

THE COURT: And that you would have a right to cross-examine those witnesses?

DEFENDANT MYERS: Yes, sir.

THE COURT: Do you understand that in such a trial you would have a right to compel the attendance of witnesses to testify on your behalf?

DEFENDANT MYERS: Yes, sir.

THE COURT: Has anyone attempted to influence you or promise you anything to induce you to plead guilty to Count 2 of this indictment?

DEFENDANT MYERS: No, sir.

THE COURT: Have you given any statement to any law enforcement officer or Assistant United State Attorney concerning the offenses charged in the indictment?

DEFENDANT MYERS: Yes, sir.

THE COURT: At the time you gave that statement were you represented by counsel?

DEFENDANT MYERS: No, sir.

THE COURT: Is the reason for your plea because you

gave a statement to the United States Attorney?

DEFENDANT MYERS: No, sir.

THE COURT: Were you advised by the United States Attorney at the time you gave him the statement of your right to remain silent?

DEFENDANT MYERS: Yes.

THE COURT: Were you advised before you gave the statement that you could have counsel advise you of your rights at that time?

DEFENDANT MYERS: Yes, sir.

THE COURT: Did you voluntarily and freely give the statement after you were advised of your right to remain silent and your right to have counsel?

DEFENDANT MYERS: Yes, sir.

THE COURT: This application by you to plead guilty is being made volumtarily and of your own free will because you are guilty and for no other reason?

DEFENDANT MYERS: Yes, sir.

THE COURT: Do you use narcotics and marijuana?

DEFENDANT MYERS: Never.

THE COURT: Mr. Mogel, do you know of any reason why your client's plea of guilty should not be received?

MR. MOGEL: No, your Honor.

THE COURT: Mr. Myers may sit in the back. I accept

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his plea.

[Defendant Myers escorted from the courtroom]

THE COURT: Mr. Mann, I understand that you wish to plead guilty to the lesser included charge in Count 2 of this indictment, murder in the second degree, of Indictment 73 Crim. 855; is that correct?

DEFENDANT MANN: Yes, sir.

THE COURT: Is Mr. Mitchell, the gentleman standing to your left, your attorney?

DEFENDANT MANN: Yes.

THE COURT: Have you discussed this indictment with Mr. Mitchell?

DEFENDANT MANN: Yes, sir.

THE COURT: Do you understand every accusation made against you by this indictment?

DEFENDANT MANN: Yes, sir.

THE COURT: Have you told Mr. Mitchell all the facts and surrounding circumstances known to you concerning these accusations?

DEFENDANT MANN: Yes, sir.

THE COURT: Do you feel that Mr. Mitchell is fully informed as to such matters?

DEFENDANT MANN: Yes, sir.

THE COURT: Has Mr. Mitchell discussed with you

any possible defenses that you might have to this case?

DEFENDANT MANN: Yes, sir.

THE COURT: Are you satisfied with the services of Mr. Mitchell?

DEFENDANT MANN: Very much so.

THE COURT: Mr. Mann, did you agree, with Joseph Carroll, John Turner, Vincent McCluskey, Robert Rippy, Chester Crawford, Paul Crawford, and Terrence Myers to rob a mail truck containing mailbags?

DEFENDANT MYERS: Yes, sir.

THE COURT: Was it part of that agreement that in attempting to effect the robbery in getting custody of the mailbags you put in jeopardy the lives of persons by the use of dangerous weapons?

DEFENDANT MANN: Yes.

THE COURT: Did you have a gun on April 5, 1973?

DEFENDANT MANN: Yes, sir.

THE COURT: Did you, on April 5, 1973, attempt to rob a mail truck?

DEFENDANT MANN: Yes, sir.

THE COURT: During the course of that robbery did you have a gun?

DEFENDANT MANN: Yes, sir.

THE COURT: Did you use that gun?

DEFENDANT MANN: Yes, sir.

THE COURT: Did you shoot William Hickey?

DEFENDANT MANN: No, sir.

THE COURT: Do you know that William Hickey was killed by Mr. Myers during the course of that robbery?

DEFENDANT MANN: Yes, sir.

THE COURT: How old are you?

DEFENDANT MANN: Twenty-six.

THE COURT: Do you understand that the maximum punishment which the law provides on your plea of guilty is imprisonment for a term of years up to and including life?

DEFENDANT MANN: Yes, sir.

THE COURT: Do you understand that by pleading guilty the Court may impose the same punishment upon you as if you had stood trial and been convicted by a jury?

DEFENDANT MANN: Yes, sir.

THE COURT: Do you understand that by pleading guilty you waive your right to a trial by jury?

DEFENDANT MANN: Yes, sir.

THE COURT: Do you understand that at such a trial you would have a right to be confronted by witnesses produced by the Government who would testify against you and you have the right to cross-examine those witnesses?

DEFENDANT MANN: Yes, sir.

THE COURT: Do you understand that in such a trial you would have a right to compel the attendance of witnesses to testify on your behalf?

DEFENDANT MANN: Yes, sir.

THE COURT: Has anyone attempted to influence you or promise you anything to induce you to plead guilty to this count of this indictment?

DEFENDANT MANN: No.

THE COURT: Have you given any statements to any law enforcement officer or Assistant United States Attorney concerning the offense charged in this indictment?

DEFENDANT MANN: Yes, sir.

THE COURT: Is your plea of guilty being made because you made such a statement?

DEFENDANT MANN: No, sir.

THE COURT: Were you represented by counsel at the time you gave that statement?

DEFENDANT MANN: No, sir.

THE COURT: Were you advised before you gave the statement of your right to remain silent?

DEFENDANT MANN: Yes, sir.

THE COURT: Were you advised before you gave the statement that you could have counsel to advise you of your rights at that time?

DEFENDANT MANN: Yes, sir.

THE COURT: Did you voluntarily and freely give the statement after you were advised of your right to remain silent and your right to have counsel?

DEFENDANT MANN: Yes, sir.

THE COURT: Is this application by you to plead guilty being made voluntarily and of your own free will because you are guilty and for no other reason?

DEFENDANT MANN: Yes, sir.

THE COURT: Do you use narcotics and marijuana?

DEFENDANT MANN: No, sir.

THE COURT: Mr. Mitchell, do you know of any reason why this defendant should not plead guilty to this count of the indictment?

MR. MITCHELL: No, your Honor.

THE COURT: I accept the plea.

Mr. Mann will join Mr. Myers.

[Defendant Mann was escorted from the courtroom]

THE COURT: Mr. Klempner, do you still feel you have to have the plea taken in chambers?

MR. KLEMPNER: I have spoken to my client and he is willing to take the plea out here, your Honor.

THE COURT: Rise, please, Mr. Paul Crawford.

Mr. Paul Crawford, I understand you wish to plead

guilty to Count 1 of this indictment, Indictment 73 Criminal 855; is that correct?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Is Mr. Klempner, the gentleman sitting to your right, your attorney?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Have you discussed this indictment with Mr. Klempner?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Do you understand every accusation made against you by this indictment?

DEFENDANT P. CRAWFORD: About Count 1, yes, sir.

THE COURT: Have you told Mr. Klempner all the facts and surrounding circumstances known to you concerning these accusations?

DEFENDANT P. CRAWFORD: I have, sir.

THE COURT: Do you feel that Mr. Klempner is fully informed as to such matters?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Has Mr. Klempner discussed with you any possible defense you might have to Count 1 in this indictment?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Are you satisfied with the services of Mr. Klempner?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Count 1 of this indictment charges that sometime after January 1, 1973, you met with, and agreed with, Thomas Carroll, John Turner also known as "Jack", Vincent McCluskey also known as "Mike", Robert Rippy also known as "Ripp", Chester Crawford, Terrence Dewey Myers, and Geoffrey Matthews Mann to violate the law in that you would steal and take mailbags from a mail route; is that correct? Did you agree with those gentlemen, whose names I have just mentioned, to rob a mail truck?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Was it part of that conspiracy, as far as you were concerned, to put in jeopardy the lives of said persons by the use of dangerous weapons?

DEFENDANT P. CRAWFORD: No, sir.

THE COURT: I gather it was part of your agreement to rob the mail truck and take the contents of that mail truck?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Pursuant to that agreement, did you meet with Chester Crawford and Terrence Myers in the vicinity of Wall Street on March 20, 1973?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Did you meet with Thomas Carroll, John

Turner, Vincent McCluskey, Chester Crawford -- You were not present on April 5?

DEFENDANT P. CRAWFORD: No, sir.

THE COURT: In other words, the extent of your participation was that you agreed to be in the robbery of the mail truck and take the contents away from the truck for your own purposes, but that was the end of your participation?

DEFENDANT P. CRAWFORD: Yes, sir.

I didn't understand that.

THE COURT: I am recapping what you said to me, which is that you did agree with these gentlemen sometime prior to April 5, 1973, to take the contents of the mail truck, in other words, rob it, and use the contents for your own purposes; is that correct?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: And pursuant to that agreement you, Mr. Paul Crawford, met with Chester Crawford and Terrence Myers on March 20, 1973, in the vicinity of Wall Street?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: How old are you?

DEFENDANT P. CRAWFORD: Thirty-two.

THE COURT: Do you understand that the maximum punishment which the law provides under Count 1 of this indictment is five years imprisonment and a $10,000. fine?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Do you understand that by pleading guilty the Court may impose the same punishment as though you had stood trial and been convicted by a jury?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Do you understand that by pleading guilty you waive your right to a trial by jury of the charges of this indictment?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Do you understand that in such a trial you would have a right to be confronted by witnesses produced by the Government to testify against you?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: And that you would have a right to cross-examine those witnesses?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Do you understand that in such a trial you would have a right to compel the attendance of witnesses to testify on your behalf?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Has anyone attempted to influence you or to promise you anything to induce you to plead guilty to this count of the indictment?

DEFENDANT P. CRAWFORD: No, sir.

THE COURT: Have you given any statement to any law enforcement officer or Assistant United States Attorney concerning the offense charged in this indictment?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Is your plea of guilty being made because you made such a statement?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Were you represented by counsel at the time you gave this statement?

MR. KLEMPNER: In effect, your Honor, there are two statements that were made by Mr. Crawford. One was a statement taken at the time of his arrest prior to the time he was represented by counsel, and the second statement, in effect, was that made to Mr. Kenney since being represented by counsel.

THE COURT: Let us split them up then, Mr. Crawford.

I gather you were not represented by counsel at the time you gave the first statement; is that correct?

DEFENDANT P. CRAWFORD: No, sir. I didn't have counsel.

THE COURT: Were you advised before you gave that statement of your right to remain silent?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Were you advised before you gave that statement that you could have counsel to advise you of your

rights at that time?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Did you voluntarily and freely give that statement after you were advised of your right to remain silent and of your right to counsel?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: There is a second statement, I understand, you gave Mr. Kenney. Was Mr. Klempner present at the time you gave that statement?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: You were present, Mr. Klempner?

MR. KLEMPNER: Yes.

THE COURT: Did you advise the defendant of his right to remain silent at that time?

MR. KLEMPNER: I did, and Mr. Kenney did also in my presence.

THE COURT: Despite having been so advised, Mr. Crawford, did you voluntarily and freely give this statement after you were advised of your right to remain silent and have right to counsel?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Is this application by you to plead guilty being made voluntarily and of your own free will because you are guilty and for no other reason?

DEFENDANT P. CRAWFORD: Yes, sir.

THE COURT: Do you use narcotics and marijuana?

DEFENDANT P. CRAWFORD: I did at one time but in December I detoxified off.

THE COURT: Last December, 1972?

DEFENDANT P. CRAWFORD: Yes.

THE COURT: Mr. Klempner, do you know of any reason why this defendant should not plead guilty as he has?

MR. KLEMPNER: I do not, your Honor.

THE COURT: I accept his plea.

Take Mr. Crawford in the back.

[Defendant P. Crawford was escorted from the courtroom]

THE COURT: That means that we now come to Mr. McCluskey.

Mr. Goldberg, I understand that you want to say something.

MR. KENNEY: Before the Government is asked to take a position on Mr. McCluskey's plea, I would like to have a moment to speak to his attorney, Mr. Goldberg.

THE COURT: I thought Mr. Goldberg wanted to say something. Do you want to talk to him before he says something to me? Fine.

[Pause]

MR. DIRENZO: May we have a five-minute recess so I can talk to my defendant?

THE COURT: Not right now.

MR. GOLDBERG: Your Honor, what complicates the problem, as your Honor can well appreciate, is the question that remains unresolved by the Court as to his competency to stand trial. I submitted the report of Dr.Portnow which now points in the direction of Dr.Abrahamson's report, but it nevertheless suggests that time being so short Dr.Portnow could not make a finding consistent with a reasonable degree of medical certainty that the man was a malingerer as opposed to someone suffering from a psychosis.

Were you, your Honor, to make a finding that he is competent to stand trial, that will resolve the matter, but I think -- and I think Mr. Kenney shares my view -- that the matter should be resolved, perhaps, before we go forward.

THE COURT: I agree, but I do not see how I can resolve it. What would happen is that Dr.Abrahamson would take the stand and Dr.Portnow would take the stand and tell me no more than what is in their written reports, and I doubt whether either of you would change much of that in cross-examining the respective doctors. Dr.Abrahamson was my choice for appointment and then you came along and asked for Dr.Portnow. It might be that some third person, or institution

such as Springfield, would be the proper person or place for your client to go to in line with Dr.Portnow's indication that time will resolve the problem.

I think without a hearing, because of the information that has been furnished me, a third report could cover a period of time rather than the short time available to both doctors. This is no reflection. Obviously I need a Dr.Abrahamson and Dr.Portnow. This was only brought up to the Court's attention a week ago Thursday and time is short because of the scheduling of the trial.

I am going to enter an order following 4244 and 4246 sending your client to Springfield for a detailed examination over a period of time. Let's see what happens as a result of that. That would, therefore, excuse you and your client. I will not accept a plea at this time from your client one way or the other.

MR. GOLDBERG: Thank you, your Honor.

THE COURT: Now we have Mr. Rippy and Mr. Carroll.

MR. KENNEY: Your Honor, Dr.Abrahamson is here and he is asking if he is free to leave.

THE COURT: Certainly, Doctor. Thank you very much.

MR. GOLDBERG: May the same apply to Dr.Portnow?

THE COURT: Yes.

MR. GOLDBERG: Your Honor, I am returning a copy

of the report of Dr.Abrahamson to Mr. Kenney.

THE COURT: All right.

MR. KENNEY: May we have a short recess at this time, your Honor?

THE COURT: We may.

MR. HAFETZ: Before a jury panel comes in --

THE COURT: They are not coming in right now. We have some other problems.

MR. HAFETZ: I have several applications I want to make, your Honor.

THE COURT: Mr. Kenney would like a short recess. Mr. Direnzo has asked for a short recess. We will take a recess at this time.

[Recess]

MR. KENNEY: Your Honor, the Government has an application with regard to Mr. Goldberg's client, Mr. McCluskey, and that is that we would like the Court to reconsider its consideration to send him to Springfield and adjourn the trial for a very short period of time to allow Dr.Portnow to have a second chance to examine this man and submit a report. We ask the Court to do this in order to avoid the possibility of three trials in this case. We will have the trial of Carroll and Rippy, McCluskey, and then Mr. Turner.

THE COURT: Mr. Turner and Mr. McCluskey could be

tried together.

MR. KENNEY: The basis for the severance for Turner, it is our information, also would apply to McCluskey as to does to Carroll. We think that on a rereading of this letter of Dr.Portnow that Dr.Portnow's indication is that he does not believe the man is incompetent in any sense.

THE COURT: Mr. Goldberg is not even here, I see.

MR. KENNEY: I understand, your Honor, that he has left the courtroom, but I will make an effort to get him back so we can do this.

THE COURT: Let's think about something else.

Have you informed Mr. Direnzo about the wiretaps?

MR. KENNEY: No, your Honor.

THE COURT: Mr. Direnzo, on Saturday morning the Government submitted to me an affidavit in camera, the details of which I won't tell you yet, but they indicated that the voice of Mr. McCluskey was picked up in a so-called unrelated wiretap and, of course, that does not concern you, but, at the same time, Saturday morning, they informed me that they had just heard at 5:00 o'clock the night before, that would be Friday night, that there was a State wiretap of Mr. X in which the voices of Mr. Carroll and Mr. McCluskey were picked up. The indication to me is that the State wiretaps cover the period just before and just after the commission of this

crime and cover about two hundred hours, so that we have a problem here which was just thrown into my lap this morning with the affidavit. They don't effect the other defendants. That's why I had no problem with them. It effects your right to have them as statements under the discovery proceeding or to attack them as illegal wiretaps.

On the wiretap in which only the defendant McCluskey was involved, although it was not his phone that was tapped, I was finished with the papers and I find nothing illegal about the tap. The question is whether you were furnished the contents. Somebody has to look at the contents to see if they are relevant and the one that was brought to my attention Saturday, just an affidavit was submitted to me this morning about 11:30, whenever we adjourned for the recess, and to which there are no supporting papers, it raises questions and I don't know how we can proceed. I can't tell you anything more than that. You have the basis of it. The contents I don't know.

It is the Government's position that the wiretaps were legal, and I tell you now that having read the papers used on the wiretap on which McCluskey alone is picked up, the papers are, on their face -- I do not have the contents of those taps and on the State one, the second one, I don't have the papers that we used --

MR. DIRENZO: Was that a New York State tap?

THE COURT: A Jersey tap. This raises two problems.

Problem one is this: Are we dealing with an illegal wiretap for a taint hearing? I would rule when I have to formally that the tap, number one, is a legal tap.

It does not, however, take care of the second problem, which is the discovery problem, statements made by a defendant, and aside from the mere representation by the Government that they are not relevant, which is the measuring rod for Rule 16, somebody is going to have to listen to them.

As to tap number two both problems exist. I can't rule on the legality. They don't have the papers. I can't rule on discovery propriety, assuming the tap was good.

Then the third point is that if there are 200 hours if you work eight hours a day, six days a week, that's only forty-eight hours. That would take four or five weeks to listen to.

MR. DIRENZO: I have gone thru that mathematical process before. They say 200 invariable, and no matter how much time you give to them they run for a much longer period because of audibility and everything else.

THE COURT: I have listened to tapes in camera.

You raised an objection to taps?

MR. HAFETZ: I did, your Honor.

THE COURT: I don't know how to handle this.

Mr. Kenney, you have to give me some basis to sustain your position that the defendants are not entitled to these tapes.

MR. KENNEY: The Government's position, your Honor, with regard to that affidavit, was that the United States Government has never been, nor is it presently in, possession, custody, or control of the tapes. It would take us some time. It would not take us very much time at all to get the underlying papers. We hope to have them in the next day or so.

THE COURT: That takes care of problem number one, whether the wiretap is a proper wiretap.

MR. KENNEY: I believe your Honor said the Government found out about it Friday night. If that's what the affidavit says it is a misstatement. I think we found out 5:00 o'clock on Thursday night and spent time --

THE COURT: My law clerk came down the subway with me Saturday morning around 9:30 and he told me it was 5:00 o'clock the night before, Friday night.

In any event, it makes no difference. I only received papers on tap number one Saturday morning, 10:00 o'clock, and just this mere affidavit on tap number two an hour ago.

MR. KENNEY: The point I was trying to make was that I spent Friday trying to find out what the condition of the

logs on those tapes were so that we could find out whether the taps would have to be listened to or the logs would be sufficient to determine where these overhearings were on the tapes. That's what delayed submitting the affidavit. At this time I am uncertain as to how long it would take us to isolate those parts of the tapes that the overhearing is on.

THE COURT: I think it is a serious question. I have never had it before. I have ruled in taint hearings that defense are entitled to see them. My taint hearing was a grand jury investigation and a question of immunity, but the same question exists there --

MR. KENNEY: I believe that was my case, your Honor.

THE COURT: You are familiar with the problem. A taint hearing, there is no doubt in my mind, you turn over the tapes to defense counsel because they are in a better position to determine whether there is taint or not. I don't know anything about the case except what you have been giving me in the papers here. I would be in no position to rule on taint.

We then come to the second problem and that's the problem, assuming that it is a legal tap and we are not dealing with taint, we are dealing with something else, I would like to discover statements. Judge Weinfeld, I am informed, has, in such a proceeding, even though it was a question of

relevancy, turned the tapes over.

MR. KENNEY: I believe he did that.

THE COURT: This is the first time I have had it. I will not decide it off the top of my head, certainly not without a complete set of papers.

MR. KENNEY: We can have the underlying papers for the second wiretap to your Honor within a day or two.

THE COURT: That takes care of taint.

MR. KENNEY: Let's assume that your Honor rules, after seeing the underlying papers, that the wiretap is a legal wiretap. Then there is no taint question and the statement should be turned over only under Rule 16, as I understand it, and Rule 16 says that the Government shall turn over only those statements that are in its possession, custody, or control, and since these statements have never been in the possession, custody, or control of the Government and won't be unless we request them from the state, there is no reason for the Court to rule whether they are relevant or not.

THE COURT: Mr. Direnzo has to have an opportunity to meet that argument. His client upon conviction, if the client is convicted of first degree murder he faces a mandatory life imprisonment, and I have no desire to go off the top of my head in a situation like this. I think we have to adjourn this trial.

As far as Mr. Rippy is concerned, he will be down in Washington anyhow. Isn't he serving a term there?

MR. HAFETZ: That's right. He is appealing that sentence. There has been a brief filed on his behalf.

THE COURT: Mr. McCluskey will be in Springfield undergoing a more detailed examination so he won't be available and I would not proceed with him because, again, we are dealing with the question of a man who is facing a possible term of mandatory life imprisonment. If we were to take a plea one year from now, just as the sun rises and sets, we will have a 2255, and without a hearing -- "Give me a hearing now"-- and I will save myself that trouble. You won't be here to remember everything that went on and I will find a new Assistant around, and then he will have to go thru the whole file, and when he finds out what is involved he will lose the file. So it is much better to go a little slow now and make sure our procedures are correct, rather than to rush and get a plea entered on the record.

The only person disadvantaged is Mr. Carroll, and I gather Mr. Direnzo is now going to make a motion that this trial be adjourned until I decide and he has had an opportunity to submit to me, in view of whatever information you can give him, what he thinks my decision should be.

MR. DIRENZO: I would have to make such a decision

and in the absence of making it, talking in futuro about 2255 proceedings, I have no desire to have a set of papers filed against me saying that my client was denied assistance of counsel.

THE COURT: I agree with you. I think the only thing that we can do is put this off. I can't make a firm date but you won't be ready for a month, Mr. Hafetz.

MR. HAFETZ: I have got a major problem, your Honor. I have a homicide case ending in Bronx County. The man has been in prison for ten months. I talked to the Assistant in charge of the case a week ago to get his best estimate of time and he said he probably would be ready to go in the middle of October on the case.

THE COURT: How long will that last?

MR. HAFETZ: I would anticipate a couple of weeks, to three weeks.

THE COURT: By the time we have gotten our problems settled with Mr. Direnzo, and by the time we get back a report from Springfield, it is certainly a month, and, as I see it, if you are on trial we will have to wait a couple of weeks for you to finish your assignment.

MR. DIRENZO: I would like your Honor to know that I had consented to adjourning this case with Mr. Goldberg and the consent of the Court and the District Attorney until

today. I had another homicide on this morning. Since I was advised to treat this commitment as an actual engagement Supreme Court adjourned the matter to October 1st. Now there is a possiblity that I can prevail upon the prosecuting authorities to possibly advance the matter that was adjourned today until October 1st, but it might well be --

THE COURT: How long would you be tied up with the proceeding October 1st? Two or three weeks?

MR. DIRENZO: It involves a homicide where a defendant is charged with killing his daughter.

THE COURT: I am at a loss to give you the exact date until we hve this preliminary problem disposed of.

MR. DIRENZO: I am thinking in terms of 200 hours.

THE COURT: You are the one that has a problem as far as being ready for trial.

Your client is incarcerated, in any event, Mr.Hafetz.

Mr. McCluskey is having a hearing but his attorney requested that a further examination be taken.

You are the only one involved. I assume you will discuss this with your client before you leave the courthouse and there is no problem as far as his adjournment is concerned. His rights are involved and nobody else's.

Let's leave it that way then.

We will move as expeditiously as possible as

follows: I would like Mr. Kenney to give me the supporting papers for what I call tap No.2 so we can decide the legality of the tap first.

Secondly, Mr. Kenney is to submit to me in detail what he knows came out of those taps, if he can. That affidavit will be kept in camera. However, he should present to you, using the terms X, Y, and Z what his problem is and what his position is.

From that point on you can submit your opposition.

MR. DIRENZO: That's the inquiry I was going to make of your Honor. In New York where they had the old application we normally would be afforded an opportunity to examine the supporting affidavit on which the ex parte order granting the interception was made.

THE COURT: You can't get that under Federal statute. As I understand the existing rule the inventory time has not run out yet.

MR. KENNEY: That's correct.

THE COURT: Therefore you cannot see the underlying papers yet.

MR. DIRENZO: It was in the early part of 1972.

THE COURT: 1973. This is a current tap. This is a tap starting January. I can't give you any more of a specific date. It was after January 1st, 1973. Under the

Federal statute you are not aware of the affidavit upon which the Court ruled, until the inventory is filed and made available --

MR. DIRENZO: But with reference to the second tap, which is a State tap --

THE COURT: It is a New Jersey State tap. You know what his position is. It is not under his custody or control and he never did have it. That's his argument.

MR. DIRENZO: I won't argue beyond that except never once have I heard him state, Mr. Kenney state, and I am not charging him, that no leads came from that tap.

THE COURT: Wait a second. That goes to a taint hearing.

MR. DIRENZO: Maybe I am getting a little bit anticipatory.

THE COURT: There is no point in talking around the mulberry bush. You know what the problem is. Perhaps Mr. Kenney can give you more details. I can only tell you what I know and that is what was included in this affidavit given to me an hour ago.

We will adjourn this trial pending a submission by the Government, and you are to reply to their request as to how this material should be used and when that is determined then we know what is going to happen. If I follow

what Judge Weinfeld did, assuming it is the same type of case, then you have 200 hours of tapes to listen to.

MR. KENNEY: If I may, your Honor, if you are referring to the case which was tried in July --

THE COURT: I have not got the slightest idea of the name of the case.

MR. KENNEY: In that case all the tapes were not turned over. I submitted the papers. I am familiar with it. We submitted transcripts, wire No.1 here, and it was those transcripts that Judge Weinfeld turned over finding, first, that the wiretap was legal, and then finding, second, that the statements on the transcripts for which there was a supporting affidavit -- A Government agent would listen to the tapes and say, "These are the only overhears regarding this particular individual" -- Judge Weinfeld found those transcripts not relevant to the present proceeding but saw no reason why they should not be given to defense counsel and in any case exercised his discretion under 2510 to do that. He didn't allow listening to the whole tape.

THE COURT: When I have to decide it I will read his opinion very carefully.

MR. HAFETZ: Excuse me. I have several applications.

Are we leaving a day open to come back to see whether we go to trial?

THE COURT: As soon as I am in a position to have a meeting, a full conference with you, I will let you know.

MR. HAFETZ: I have several applications. Aside from those, I gather Rippy's writ will be marked satisfied so he can return to Washington forthwith.

THE COURT: You don't need him here, do you?

MR. HAFETZ: No. The last time there was confusion and he lingered in West Street six weeks. He claimed this was prejudicing his right to perfect his appeal in Washington.

THE COURT: He will go back as soon as you give me the papers to sign, as far as I am concerned. Bring it up to chambers and I will sign it.

MR. HAFETZ: In addition to that, as part of the discovery request, it was my understanding that a prior criminal record of the defendant and prior convictions or pending charges with respect to Government witnesses would have to be furnished by the Government sometime prior to trial. I have not received those. I take it there is no problem with Mr. Kenney turning them over to me.

MR. KENNEY: Except that we disagreed that we would turn over prior criminal charges.

MR. HAFETZ: Convictions or pending charges.

THE COURT: My opinion is pretty explicit on that.

MR. HAFETZ: I thought it was. I have not gotten

that material yet.

MR. KENNEY: We have no problem turning it over. We have not yet, but since the trial date has been adjourned I assume --

THE COURT: You didn't know that when you came in here this morning.

MR. KENNEY: We are not prepared to go to trial --

THE COURT: You were prepared when you walked in here this morning.

MR. KENNEY: I was prepared to go to trial but not before we took the guilty pleas.

THE COURT: When did you expect to turn the information over to him?

MR. KENNEY: When the jury panel started to come in.

THE COURT: Give it to him next week.

MR. HAFETZ: In addition, I was going to request the minutes under the Criminal Justice Act, a daily transcript. I can hold that off until the trial starts.

I do want to get the minutes of this morning's session as well as the actual beginning of testimony.

THE COURT: What do you need this morning's testimony for?

MR. HAFETZ: In the event any of the witnesses,

any of the people who have pleaded will testify at trial, for purposes of possible impeachment, if the stories differ in any respect.

THE COURT: It does not have to be daily. You may have it.

MR. HAFETZ: I will renew the application once the trial starts.

THE COURT: I think I have to sign a special authorization for you. Speak to the reporter.

MR. HAFETZ: There is another problem that I want to raise now. I am not certain of the facts but I think it has to be raised and put on the record.

As to the defendant Turner I have some suspicion that Turner, perhaps, was cooperating with the Government prior to the indictment and that perhaps his severance has something to do with him keeping separate, that is he was indicted as a culprit to protect him and perhaps the severance is that he doesn't have to stand trial since he is in fact not really a defendant, or if he is some decision had been made beforehand that he would be indicted and he could be allowed to plead to a certain lesser offense at trial.

The problem is, I think, I have not communicated directly with Mr. Turner's counsel, that if in fact Turner has been prior to or since indictment a cooperating Government

witness, I have communicated with the consent of other co-counsel who may have communicated with Mr. Turner's counsel, and I feel we may have a problem which I think the Southern District Second Circuit has dealt with before, of a man being named in an indictment as a defendant who was really a cooperating party with the Government all along, and there are possible Sixth Amendment problems thru co-counsel not knowing that fact. I think the Government has an obligation, at least, to advise other co-counsel whether Turner is, in fact, and was, a cooperating party at the time of the indictment.

THE COURT: I suggest you speak to Mr. Kenney later and if you have any problems let me know.

MR. HAFETZ: Thank you, your Honor.

THE COURT: Is there anything else?

MR. HAFETZ: No.

THE COURT: Mr. Mitchell, I will hear from you.

MR. MITCHELL: Your Honor, in view of the wiretap disclosure of which we knew nothing -- I am speaking for myself -- although the defendant was not named as such there has always been in our minds -- speaking for Mr. Mogel and myself, a great interest in how the Government, in the first place, got hold of Myers and Mann because, thru all the disclosure and everything, there was never any discussion of

anything that they affirmatively did or occurred. I would like to be made a part, at least, to the Government's disclosure on the wiretaps with the possiblity of taint. That's all I am interested in.

THE COURT: No. I don't see that you are a party aggrieved in this proceeding at this point. I say it is Mr. Direnzo's wire. Youare not entitled to participate in anything effecting the legality of the tap.

MR. MITCHELL: It is only if your Honor grants the turning over of the taps or those parts that are pertinent that I think the defendant Mann has an interest in seeing that since he is allegedly involved with McCluskey and Carroll. The lead may have come from something in those taps.

THE COURT: Suppose the lead came from a legal wiretap? Your position is only legality of the wiretap; isn't that it? Isn't he the only one that can raise legality of the wiretap and not you?

MR. MITCHELL: That's right.

THE COURT: If you can formalize something better than you have, present it to me here after consultation with Mr. Mogel or other counsel, and I will entertain anything you think is proper.

MR. MITCHELL: All right, your Honor.

THE COURT: Right now I do not think you have any

standing, one way or the other.

Is there anything else?

I will put the burden on you, Mr. Mitchell. There are two counsel whose clients have pled guilty and that's Mr. Goldberg and Mr. Klempner. Those are the two we are missing. I suggest you inform them of what has happened here after the Court returned from the short recess that was taken. It didn't enter my mind I had to tell them to stay here. You and Mr. Mogel stayed here.

Perhaps you, Mr. Direnzo, should inform Mr. Goldberg of what has happened.

MR. DIRENZO: I shall, your Honor.

THE COURT: He is directly involved in this.

MR. DIRENZO: I shall.

THE COURT: The Clerk has pointed out to me that there was nothing about bail. I assumed that bail was fixed under the old indictment.

Mr. Hafetz, I am going to have the Clerk endorse on the indictment "Bail originally fixed" -- whatever it was on the last indictment. Nobody raised the question of bail.

MR. HAFETZ: I didn't raise the question. It is academic.

MR. DIRENZO: I take it that the same bail conditions will continue with reference to the superseding indictment

and I will so inform the defendant. I think the bail is excessive but I do not think it will do me any good to make another application to reduce it.

THE COURT: You made one already.

Will you also inform Mr. Goldberg and Mr. McCluskey if he is still there. I am sure he would have no objection to that.

Did the Magistrate fix the bail for Turner, Mr. Kenney? What is Turner being held under?

MR. KENNEY: I'm trying to remember. Bail was fixed by the Magistrate -- I don't know whether he appeared before the Magistrate or room 110.

THE COURT: You have a defendant around who has no bail. You better find out.

MR. KENNEY: I'm sure the bail was fixed. I will find out immediately.

[Time noted: 12:30 p.m.]

I (We) [illegible] the foregoing is a true [illegible] to the best of my (our) stenographic notes of this proceeding.

[illegible]

Official Court Reporter
U. S. District Court

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UNITED STATES OF AMERICA,

v. : 73 Cr. 855

THOMAS JOSEPH CARROLL, JOHN TURNER a/k/a "JACK", VINCENT MC CLUSKEY a/k/a "MIKE," ROBERT E. RIPPY a/k/a "RIPP," CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN,

Defendant.

November 7, 1973

BEFORE: HON. CHARLES M. METZNER, District Judge.

Appearances:

John J. Kenney, Esq., for the Government.
Frederick P. Hafetz, Esq., for Defendant Rippy
Jay Goldberg, Esq., for Defendant McCluskey.

THE COURT: I have received two communications here regarding this trial that is down for November 26th, and I don't know what we are going to do about it.

Let us take Mr. Goldberg first. You say you are not ready and won't be ready. You will have to get somebody else to represent your client, because I can't put this case over any more.

MR. GOLDBERG: Well, with all due respect, I have been paid, and your Honor set a trial date after I was in the midst of a trial with Judge Knapp in this courthouse, and it's not a question of my taking --

THE COURT: Did you tell me that you were on trial before Judge Knapp on September 17th?

MR. GOLDBERG: September 17th?

THE COURT: Yes.

MR. GOLDBERG: I haven't seen your Honor from the time you ordered -- was September 17th the day that the trial was to commence? No, I wasn't on trial then, but your Honor didn't fix any --

THE COURT: Did you tell me about your future engagements?

MR. GOLDBERG: No. You committed this man for 90 days for evaluation --

THE COURT: I didn't commit him for 90 days. You are in error. I sent him out for a fast examination to come back here as quickly as possible.

MR. GOLDBERG: That is true, but you didn't ask me anything about any commitments, most respectfully.

THE COURT: Don't you think you should have told me about it, k[illegible] we had to get rid of a case where men were sitting in jail?

MR. GOLDBERG: Did I at that time?

THE COURT: Yes.

MR. GOLDBERG: No, most respectfully. Had you said to me, "I want to try this case in November," I would have

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brought to the Court's attention what my trial schedule was; but my position is that my client is in jail and has paid me a fee. I will not return the fee. I will not try to secure other counsel for him. I am prepared to try this case, but it all may be academic, your Honor. If you recall, the defendant said he wanted to plead guilty, so I don't want to get the Court or myself --

THE COURT: He said he wanted to plead guilty at a time when you thought that he may not be competent to stand trial, so I can't take that statement made in court that morning.

MR. GOLDBERG: That's true.

Well, my personal opinion of his sanity was, I think, communicated to Mr. Kenney. He told me that -- or the doctors I had employed, or the doctor I employed said that he thought possibly he was a malingerer. He pressed, and his family pressed that he was insane and not competent, and I carried forward the wishes of the defendant and his family; but I thought perhaps he could have been able to plead. But out of an abundance of caution, your Honor did the appropriate thing and ordered him to be evaluated.

THE COURT: I didn't give him 90 days because I was in a hurry to try this case. You have men in jail.

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MR. GOLDBERG: That's true but --

THE COURT: I think you should have told me, "Well, when this man comes back, my calendar looks this way."

You didn't give me any indication that you were tied up, that I couldn't fix a date as soon as he came back.

MR. GOLDBERG: I really -- is he back, by the way, Mr. Kenney?

THE COURT: He is on his way back.

MR. KENNEY: He is not back. After I spoke to the Judge's chambers this morning, I called Springfield, and I haven't been able to get through to Dr. Eberle, who is the doctor in charge, but I am continuing to try to do that; and as soon as I have information as to when he will return, I will let all parties know.

MR. GOLDBERG: I don't contemplate that I am going to have any change in position from him. I have spoken to him that day, and it seemed to me -- I am not an expert -- that he understood which end was up, although the doctor that we had engaged said that they needed more time, and your Honor quite appropriately said, "Let's put the matter to rest and find out one way or the other."

But I believe his position will be as it was when he left, but I do want to tell the Court that I wasn't under any impression on September 17th from anything that the Court said

that the Court wanted my calendar situation. If there is anything in the minutes to indicate otherwise --

THE COURT: No, I just think thatyou should have been smart enough and known, and you should have told me what your calendar was as soon as we got the man back. I think you should have figured the man would be away for four, five, or six weeks, and then I would go to trial, because I have been trying to get this case disposed of.

MR. GOLDBERG: Yes.

THE COURT: It is perfectly obvious, and there are people in jail, and they can't keep sitting there until the end of December and January when I can't try them. I am tied up now from February 20th to the end of May in two eight-week criminal trials with people in jail.

MR. GOLDBERG: I am the last one to quarrel about the courtesy the Court has extended. The Court has been courteous to me in granting one adjournment at my request; but I took this case, I came to court that morning --

THE COURT: I am just saying you should have told me, knowing that we were trying to press this case to trial, and you would have been called upon on a trial in October or November.

From what you are telling me now you knew you had a commitment before Judge Knapp from October through the

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end of December, so obviously I never could have tried the case, could I, even if I asked you in September.

MR. GOLDBERG: Now you are telling me what your Honor's trial calendar was, but I had no way of knowing when this man came back -- I assume this case I am on will end December 10th.

THE COURT: Let's put it this way:

When we sent your client out to Springfield on September 17th, when did you think I was going to try the case, January, February?

MR. GOLDBERG: No. I will be finished here around December -- the first week in December, and you have set a date for November 26th. I am not -- did I write in my letter that this case will go until the end of the year, because today the government said --

THE COURT: It was scheduled to last until mid-December.

MR. GOLDBERG: Mid-December, December 15th.

There was talk this morning that it could end around December 10th, although we have not been moving rapidly, which is no fault of mine. There are five lawyers in the case.

THE COURT: I am not talking about that. I am talking about what did you think when I sent your man away on September 17th for an evaluation? What do you think I had in mind for the trial date of that case?

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MR. GOLDBERG: I didn't consider that because I thought that either he would be found insane and there would be no trial, or if he was found sane, I had assured myself in conversations with him that day that I felt , although I was no doctor, that I had his commitment that he was prepared to plead guilty.

THE COURT: Supposing when he came back he changed his mind.

MR. GOLDBERG: That's what I am worrying about. He has been out in Springfield with a truckload of jailhouse lawyers. He could come back --

THE COURT: That's right. What are you going to do in the situation? Didn't you contemplate that he might change his mind, or he would have a right to change his mind and that you would be asked to go to trial at the end of October or in November? What would you have done if he came back within two weeks, and I said, "All right, we go to trial in October"? You are on trial in November.

Shouldn't you have told me in September that you couldn't try this case with this man going away until the end of the year or the beginning of next year.

MR. GOLDBERG: What is most important, if YOu think I should have, then I am wrong as --

THE COURT: I am trying to figure out why you

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didn't think that.

MR. GOLDBERG: Well, I --

THE COURT: You know the pressure this court is under to get rid of cases.

MR. GOLDBERG: This is true.

THE COURT: Especially with men in jail,and when I sent the man away in September you should have said, "Judge, you are sending this man away, but I want you to know I can't try this case at the end of December or the beginning of January because I am ontrial before Judge Knapp," instead of writing me now, on November 6th, when I have the case for the 26th. I have other cases lined up.

MR. GOLDBERG: The first I heard after he was sent away in September was a letter from the Court, I think last week, saying the case is set for November 26th. I had contemplated --

THE COURT: Last week?

MR. GOLDBERG: Is it last week or am I wrong?

THE COURT: October 23rd.

MR. GOLDBERG: October 23rd.

THE COURT: Today is November 7th. But what could you have thought the trial date would have been?

MR. GOLDBERG: I thought that we could try the case in mid-December.

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THE COURT: That is pretty late, isn't it? That's my point. There is a fellow sitting in jail since June.

MR. GOLDBERG: I think from November 26th to mid-December doesn't -- I mean, I am not the judge, but it doesn't --

THE COURT: It is not from the middle of November to mid-December. It is from last June that they were put in jail. That is what you measure it from. Six months in jail is a long time.

MR. GOLDBERG: Well, my client was receptive to the transfer to Springfield, so he has no cause to complain, I'm sure.

THE COURT: No, but the other defendant has.

MR. GOLDBERG: Yes.

THE COURT: He has a lot to gripe about. My point is you can't keep him in jail because you are tied up.

MR. GOLDBERG: You couldn't fit this -- it is a shame, your Honor. I am before your Honor twice, and I am always here for the same plea.

THE COURT: But how do I know you are through before Judge Knapp? I have found out that these cases never end the way they are supposed to end. That is what I am coming to Mr. Hafetz about. I fixed the November 26th date to help you, and not earlier, because you made a statement that you

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were going to be on trial in the Bronx.

MR. HAFETZ: Let me state what has happened, Judge.

Unfortunately, they don't work there with the precision that the Federal courts work, and when I was here last on this case in September, I stated I thought I would be on trial in October. I had a conversation with the D.A. and he said this was his next case.

I have been down there, I think, three or four times. Every time I go there I state I am ready. The D.A. has requested short adjournments because his witnesses could not -- he wasn't ready, his witnesses couldn't be found.

He told me certainly by mid or late October we would be on trial with the case.

The court would not mark the case ready until last week, last Monday, Monday of this week. He finally marked the case ready and passed it to this coming Monday, November 12th.

The case on trial before him now, is going to finish this week, I am assured by both court and prosecutor. Then my case should start next week. At least, I am hoping that.

I must say there is another case marked ready and passed along with mine. The judge tells me there is probably going to be a guilty plea in that case. The prosecutor

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and the defense are in negotiations on it. So both he and the prosecutor tell me it looks like my case will go next, which is probably -- I think there is a good chance it is going to start on Monday.

The man has been in jail for 13 months, we are retained on the case, I have brought writs of habeas corpus for not trying the case earlier. I have done everything in my power to move --

THE COURT: How long can I keep a case waiting for you while you are waiting for the judge in the Bronx?

MR. HAFETZ: Well, I would --

THE COURT: Supposing the case goes over?

MR. HAFTEZ: Well, then ---

THE COURT: Then you come back to me and say, "Well, I can't do it now because I have this Bronx case."

I can't keep playing it that way.

MR. HAFETZ: I understand, Judge. I really don't know what the answer is.

THE COURT: How long is your case going to take in the Bronx?

MR. HAFETZ: I would estimate two to three weeks, Judge. To be safe, I would say three weeks.

THE COURT: That means you are free December 3rd?

MR. HAFETZ: The 3rd, I would estimate.

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THE COURT: How long is this case going to take, Mr. Kenney?

MR. KENNEY: I estimate the government's case will be three days, your Honor.

THE COURT: What about your defense?

MR. HAFETZ: I would imagine one day, Judge, if that at all. I'm not sure whether he will testify, and if he does, he will probably be my only witness; and that would be, I would think, not more than a day.

THE COURT: I can't set a case down and not find you ready. It means I just sit here waiting for you, and I can't do that.

MR. HAFETZ: I know that. I mentioned my problem to the judge, and I told him about the case. After I got the letter, I called your Office, I think, that week --

THE COURT: Friday.

MR. HAFETZ: I forget if I talked to Mr. Kleinberg or Mr. Levine, a nd they said, "Put it in the form of a letter." So I waited until Monday thinking I might possibly start this past Monday and that would obviate any problem. When it didn't, I then sent a letter.

THE COURT: What is your schedule, Mr. Kenney? You are entitled to some voice here.

MR. KENNEY: I am prepared to try it whenever the

gtmbl3

Court is available.

MR. GOLDBERG: Your Honor, you know, when I got into this case, I really bombarded your chambers with a number of motions. I spent a considerable number of hours in connection with this case. I contemplate I have to work on the assumption, after speaking to the family, that he still adheres to what he said earlier. The family is not --

THE COURT: What happens if he changes his mind? I can't keep pushing the case around. I must assume when a date is set for trial we are going to trial, and you can't go on the assumption he is going to plead guilty.

MR. GOLDBERG: WEll, do we know if he is going to be back in the next day or two? I can seem him --

THE COURT: He will be back within the next week, but that's all he has to be.

MR. GOLDBERG: I thought he had left Springfield already, your Honor.

THE COURT: No, he didn't say that. He didn't say that, but he will be back within the next week, which is plenty of time for preparation for November 26th.

MR. GOLDBERG: But Hopper repreents the brother.

THE COURT: Don't worry about Hopper. Don't worry about Mr. Shestack and don't worry about Mr. Hopper. You just worry about your client.

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MR. GOLDBERG: Hopper had been co-counsel with me on this case.

THE COURT: He was here and we discussed it. He said there was no conflict as a result of that, he is not in that case, he has taken this one, and he is ready for trial on November 26th.

MR. HAFETZ: Judge, may I just say, if I go up on Monday and I find out the other case has started, the other case that is marked ready, I would be in a position -- I mean I will have to adjourn the other one. I don't think I can keep juggling and asking for a postponement here.

I have a difficult family to deal with on that one -- I don't blame them -- but I would be able to advise the Court on that -- I may still be able to keep the date that the Court has here, and I think I will know on Monday or even a little bit later date, if that accommodates Mr. Goldberg, if I had to take a months adjournment, if the case up there is not starting on Monday, and I have to take a month's adjournment.

THE COURT: But he says he is not ready to go until the 10th of December.

MR. HAFETZ: As far as my man being prejudiced, Judge, he is serving time; Rippy I am talking about --

THE COURT: I am not worried about the prejudice;

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I am worried about the trial. I have Carroll in jail, and he can't sit around because other lawyers have other engagements on which they are making money.

MR. GOLDBERG: Suppose Carroll were to consent to -- I will speak to Mr. Direnzo. The government claims Carroll and my client, McCluskey, have a close relationship. That is the government's contention, and it may be, and if that is so, we will find out and I will report --

THE COURT: If he decides to stand trial, how long will your case take?

MR. GOLDBERG: There are no witnesses that I contemplate.

THE COURT: Will he take the stand?

MR. GOLDBERG: The answer to that is no.

THE COURT: You see, I have to get out of here by the end of December because I go into Part 1 the first two weeks in January, I can't try a case when I am sitting down in 110 or 318 --

MR. KENNEY: It is 506 now.

THE COURT: Anyhow, you can't try a case during the day.

MR. GOLDBERG: Three days is the government's tria?

THE COURT: He says the government will take three days to put its case in. We don't know where Direnzo stands

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in all this.

MR. GOLDBERG: Is there any way to expedite the return of Mr. McCluskey, and then I will see him quickly and report back to the Court what the situation is?

THE COURT: Let us leave it this way:

First of all, I think, Mr. Kenney, you better find out from Direnzo what his schedule is, because we can fix a date, and he is going to come in, "We can't do it then."

Can you do that, Mr. Kenney?

MR. KENNEY: Yes, your HOnor.

THE COURT: Secondly, Mr. Goldberg, you better speak to Mr. Direnzo about any possible adjournment affecting his client, and what his position will be, because if his client is going to yell like a stuck pig, I am going to go to trial and your client will have to get another lawyer. I can't hold a man in jail this long.

MR. GOLDBERG: Is that November 26th, your Honor?

THE COURT: Yes.

MR. GOLDBERG: I mean, I don't know what my obligations are; I mean, bar association and the rest --

THE COURT: Those are your problems. Those aren't my problems. My problem is, is sufficient notice given of the trial. I wrote to you on October 23rd. Your letter to me is November 6th. You were on trial on October 23rd. You could

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have told me the 24th or the 25th of October, two weeks ago. Don't send it to me now. We would have had more time to move around. Maybe we could have gotten your client back faster; I don't know.

I still think you had an obligation back in September, when you knew I was trying to get this case going, that you would be faced with a trial in this case at the end of October, the beginning of November. It had to be. You knew you were going to be on trial in the middle of December.

YOu should have told me then thatyou won't be around and you couldn't try the case --

MR. GOLDBERG: You put the defendant returning from S pringfield with Hopper out of this case --

THE COURT: Hopper you put out of the case. I didn't put him out of the case.

MR. GOLDBERG: I didn't put him out.

THE COURT: You certainly did. YOu came in and you represented him last July, and he was no longer identified with the case, so forget Hopper.

MR. GOLDBERG: He appeared at the table as my co-counsel, if you recall.

THE COURT: He told me he was not co-counsel. I asked him in this courtroom last week.

MR. GOLDBERG: When he was retained by someone else,

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he asked me if he could be relieved, and I said yes. Now my client hasn't been returned from Springfield, and Hopper isn't in the picture, and I am not in the picture. It was most unfortunate. I didn't move to have him sent to Springfield--

THE COURT: You moved to havea psychiatric examination of the man, didn't you?

MR. GOLDBERG: Yes.

THE COURT: So you put it in motion, and as a result of your doctor's report, he said he didn't have enough time to determine whether this man was competent to stand trial.

MR. GOLDBERG: That was true, but I was willing to rest on that, and offer to plead him guilty because I thought at that time -- did I --

THE COURT: How could I possibly,in view of your doctor's report, have accepted a plea of guilty that day?

MR. GOLDBERG: Because doctor --

THE COURT: You would be here with a 2255 so fast it wouldn't be funny.

MR. GOLDBERG: I can only speak for myself. That is, not so far as I am concerned.

MR. KENNEY: As far as Mr. Goldberg's motion to cause --

THE COURT: Thatis true. You didn't like ABrahamsen and you wanted to get your own man in there.

MR. GOLDBERG: Your Honor, in the middle of December there is no chance for three days to fit this case in, and then I will tell Judge Knapp that we just have to move the case along?

THE COURT: I can try it. How about Direnzo? You have to get a waiver from him.

MR. GOLDBERG: I will do that.

THE COURT: Because this fellow would have been in jail for more than six months. That is contrary to our rules.

MR. GOLDBERG: I will undertake the assignment.

THE COURT: Because he will come in then with a bail application which I will have to grant, and I can't do it because you are holding him up.

MR. GOLDBERG: I will have to undertake to insulate everyone from any prejudice from this unfortunate -- this case is a nightmare for me.

THE COURT: What are you going to do, Mr. Hafetz?

MR. HAFETZ: If you set the December date, if the Bronx case gets to be adjourned so here is not enough time between the date it is finally going to start, looking at late [illegible]ber, early December, I am just going to have to take an adjournment in that one until January.

THE COURT: I suppose the latest we can start this so you don't get tied up with jurors and Christmas would be the

12th of December. Would you figure that would be true, Mr. Kenney?

MR. KENNEY: Yes, your HOnor, I think that--

THE COURT: Because once you get a jury into that 21st, you are licked with Christmas coming on Tuesday. I would sit, but I will bet you will have a Presidential Proclamation that the courts are closed on the 24th, as it happened last year on the Friday before.

MR. GOLDBERG: The next week is too late, the 20th or the 19th?

THE COURT: If you start the 17th, that doesn't guarantee that you will get to the jury by the 20th, because you have to get to the jury by the 20th. You have to leave an extra day, Friday, the 21st, so that's why you must start the week before.

MR. KENNEY: Your Honor, we also call the Court's attention to the fact that there will probably be a great amount of accomplice testimony here, so although the defendants say that they won't put in any defense, there will probably be extensive cross examination of the government's witnesses.

THE COURT: I think December 10th is the latest you can start this case and make sure that a jury has plenty of time to decide without the pressure of Christmas, because once you go

over that you are licked.

I am here so it makes no difference. Juries can get a little angry being brought back between Christmas and New Year's.

December 20th is a holiday. That is Chanukah, a Jewish holiday.

MR. HAFETZ: That is not a day for being off the court, is it?

THE COURT: Not me, but you may have a juror ask to be excused.

MR. HAFETZ: On Chanukah?

THE COURT: That is what my clerk tells me.

MR. GOLDBERG: I never heard that as a basis for -- is that --

THE COURT: Not me, but if a juror asked me to be relieved, what are you going to say, "No, you can't, the defendant won't let you go"? I have never had somebody ask to be relieved.

MR. HAFETZ: I remember other holidays but not that one.

THE COURT: All right, the date is December 10th to start this case, the latest. You are going to have to work it out somehow.

MR. GOLDBERG: All right. Mr. Kenney, can you use

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your best efforts to get him back as soon as possible?

MR. KENNEY: I don't mean to depreciate and deprecate my efforts, but I have been using my best ones since September, and it took me almost two weeks to get him out of West Street, so I certainly will, yes.

MR. GOLDBERG: Then I will speak to him and report back to the Court.

THE COURT: But you better get a clearance from Direnzo, because without a clearance from him, this goes up the flue.

MR. GOLDBERG: I will call Direnzo.

THE COURT: All right.

MR. KENNEY: Your Honor, is the trial date still set for the 26th?

THE COURT: The trial date stays as of for November 26th until I am advised that we can have a short adjournment without any further adjournments being necessary.

MR. KENNEY: Thank you, your Honor.

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I (We) hereby certify that the foregoing is a true and accurate transcript to the best of my (our) ability from my (our) stenographic notes of this proceeding.

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UNITED STATES OF AMERICA

vs. 73 Cr. 855

WILLIAM McCLOSKY,

Defendant

November 13, 1973

PRESENT:

Mr. KENNEY

MR. GOLDBERG

- - -

THE COURT: I sent for you, Mr. Goldberg, because at our conference last Wednesday I asked you to contact Mr. Direnzo the next day and let me know about his calendar for any possible adjournment to December 10th. Now it is Tuesday and I have not heard from you. I am looking for you. I should not have to be running after you, Mr. Goldberg. You have a responsibility to the Court.

MR. GOLDBERG: You told me to contact you the next day, your Honor?

THE COURT: Yes. That was Thursday. I did not hear from you Thursday, I did not hear from you Friday, I did not hear from you Monday. Today I had to run after you. If I did not run after you I would not hear from you now, and you have been in this building all week.

MR. GOLDBERG: I called Mr. Direnzo, his office,

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FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

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twice. He has not --

THE COURT: What about calling him at home?

MR. GOLDBERG: There is one man who knows where he is, could be reached, and I have not been able to reach him.

THE COURT: I will send a marshal after Direnzo, if I have to, and I will send one after you next time. I am not going to be sitting around worrying about you and your responsibilities to this Court. We have a trial set for November 26 and I find feet dragging. I don't like it.

MR. GOLDBERG: I understand. As soon as I can get a hold of the defendant I am reasonably confident of the result. I am just a little upset that I have not had a chance to talk to him. I might not have to stand here before you in this position.

THE COURT: What about Direnzo? If it turns out that your client is standing trial, then this case will have to be put over obviously to get another attorney to represent him because Judge Knapp told me at lunch today you could not possibly be finished by December 10. Impossible. He said December, 1974, in a joking manner, to me.

MR. GOLDBERG: I think that's a fair assessment, your Honor.

THE COURT: Obviously I can't keep nursing this case along. It is going to go to trial and Mr. McClosky will

have to get another lawyer.

MR. GOLDBERG: So be it. I have called Mr. Direnzo twice. I have not called him at his home, although I understand from the government they have sent him a telegram and called him also.

THE COURT: I also asked you to do it, so I suggest you try him tonight at home and let my chambers know tomorrow morning before you continue your trial before Judge Knapp.

MR. GOLDBERG: I will do that. I want to apologize to you for what seems to be conduct on my part that is not meant in any way to slight this Court. You have been very, very patient with me, with respect to all --

THE COURT: What luck have you had, Mr. Kenney?

MR. KENNEY: Your Honor, I found out at 3:00 o'clock today that the examination of Mr. McClosky is completed and I relayed to the marshal the order that he be returned by the fastest possible means of transportation, just before I came into the courtroom. I expect to have him here this week.

THE COURT: Notify Mr. Goldberg as soon as he is available here. Mr. Goldberg is on trial in this Court. It should not be difficult to find him.

What about getting hold of Direnzo?

MR. KENNEY: I called Direnzo each day since we

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were here last Thursday without success, although I reach his office and leave messages there. I sent him a telegram Monday morning asking him to call the U. S. Attorney's office. That has not resulted in any call.

THE COURT: May I suggest you call the U. S. Attorney in the Eastern District and the District Attorneys in Bronx, New York and Brooklyn to find out if they're on trial with him before some other judge?

MR. KENNEY: Yes, your Honor.

THE COURT: I know he is quite busy. I don't like to send a marshal after him, but I will, if I have to.

All right.

I (We) hereby certify that the foregoing is a true [illegible] to the best of my (our) [illegible] my (our) stenographic [illegible]

Official Court Reporter
U. S. District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

v.

CARROLL, et. al. (Vincent McCluskey),

Defendants.

----------x

73 Cr. 855

Room 705, U. S. Court House,
New York, N.Y.
November 19, 1973

B e f o r e :

HONORABLE CHARLES M. METZNER,

District Judge.

A p p e a r a n c e s :

Paul J. Curran, Esq., United States Attorney,
For the government,
John J. Kenney, Esq., Assistant U. S. Attorney,
of Counsel.

Jay Goldberg, Esq.,
Attorney for defendant McCluskey

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THE COURT: Mr. Goldberg, I understand you have spoken to your client.

MR. GOLDBERG: What I wanted, most respectfully, is the client's trip here not to be wasted. Mr. Kenney says by mistake he was sent back after I spoke to your chambers, through an error,

I told the defendant the Court wanted him to get another lawyer.

THE COURT: Unless he wanted to take a plea, as you indicated he was going to.

MR. GOLDBERG: It's not my fault. The "deal" has been changed by the prosecutor, so what am I to do? He wants to, of course, take a plea, and obviate the trial of his -- you know his brother is a defendant, and it's easy to take a plea, but Mr. Kenney has now made other conditions that he's got to cooperate in everything he knows on all matters unrelated to this and --

THE COURT: Well, of course, I can't interfere in that.

MR. GOLDBERG: Of course.

THE COURT: That is up to Mr. Kenney, but as I gather it then, your client will be standing trial.

MR. GOLDBERG: I went to the pen. I asked to see him during the luncheon recess in my trial. He comes in

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looking the same way you saw him on September 17th. I sit down; I say, "They found you sane." He said, "I am not sane. Don't I have a right to a hearing?"

So I said, "Maybe you do. I am just asking Mr. Kenney about that right now,"and he says he wants to speak to the judge.

I said, "I have something else fo ryou. You have to get yourself another lawyer."

So he said to me, "Where am I going to get another lawyer?" I said, "Well, I think I ought to call the Judge's chambers and you go up and physically talk to him and make your position known to the Judge."

I would think, your Honor, you ought to direct him to get another lawyer. I can't.

THE COURT: I gather you can't be finished by December?

MR. GOLD: WE are moving very rapidly, and I mentioned that to Judge Knapp today. On the other hand, I don't want to mislead you. We are moving so rapidly that we don't have a Friday session. I am the only one to dissent. I wanted to work Friday, the day after Thanksgiving and not take it off, but Judge Knapp thinks we are moving rapidly, and the government says it will be finished.

THE COURT: When?

MR. GOLDBERG: Two weeks from last Friday.

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THE COURT: You mean to 30th of November?

MR. GOLDBERG: Is that two weeks from last Friday?

THE COURT: Yes, two weeks from last Friday is the 30th of November.

MR. GOLDBERG: I know one defendant in that case is going to testify. Another defendant may.

THE COURT: That is too tight. If you finish by Friday, in other words, that is five trial days. There must be summations and charge as part of those five trial days.

MR. GOLDBERG: My position has to remain this, your Honor: I don't want to come into battle with the Court. Whatever you direct I do, but I want our position to be crystal clear, and that is McCluskey, if he wants to get other counsel, I am all for it. The case has been very troubling from the outset,not because of the Court but because of scheduling and my problems.

On the other hand, if he says he won't get other counsel, I am prepared to try the case when I am available. I am not sitting in some state court.

If you direct that he get other counsel, there is nothing I can do.

THE COURT: Obviously, under the Reisner case and Santoro case, if your scheduling is such that you can't try it, then he must get other counsel.

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MR. GOLDBERG: I asked him this. I said the defendant who is in prison is Mr. Carroll. What is his position?

He said Carroll will consent to --

THE COURT: But I can't. I have no more time left. I have been trying to get this case tried since last summer. I put it off originally because the various attorneys had summer vacations scheduled already, and they wanted to get motions in, so we made it the Tuesday after Labor Day.

Then they put it off for some other reason. I think it was on your application that I put it off to the 10th of September. We did that, but then up comes this matter.

I just can't keep putting it off and putting it off, and I can't keep rearranging my schedule.

MR. GOLDBERG: Your Honor, I want you to know this: My thoughts came to me after I left when you had said why don't I notify you and so forth that this was supposed to be a four- to six-week trial, which would have had to be finished starting October 17th, by the first week in December. Am I not correct?

I haven't the calendar before me. When I went home I thought easy if it were a four-to six-week trial. That is what the government told Judge Knapp, and we have been representing to judges throughout the city.

Through some scheduling problem, as often happens

in a case, it's been extended, but through no fault of mine. I would have been finished December 1st.

This is a murder case where it will be a mandatory life. I can't work out the plea and it's not my fault. It's not the defendant's fault either, but Mr. Kenney has new conditions.

Is the defendant supposed to go to trial after his lawyer has worked all summer on the case? I don't know the answer to these questions.

THE COURT: I think the defendant has to go to trial on the date set by the Court if he is given reasonable opportunity to obtain counsel. The date originally set was in September. If you recall, there was other counsel representing this man to start with, privately retained. You came in in the middle of it, and said he wanted to switch counsel, so he switched counsel. We fixed the date.

Now he had to go for a hearing, but that meant that as soon as he came back we were going to go to trial again.

Your schedule was such you couldn't have gone to trial when he came back, according to what Judge Knapp tells me.

MR. GOLDBERG: October 17th.

THE COURT: You couldn't have gone to trial.

MR. GOLDBERG: But, Judge Metzner, this is the thing

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I don't understand. When you committed him to Springfield, will the minutes reflect that it was to be anything other than -- isn't the ordinary period of observation ninety days?

THE COURT: No.

MR. GOLDBERG: It's not? Then this is my first experience with this.

THE COURT: Ninety days is on a sentencing. When you send for a report, you give them ninety days and sometimes you only give them thirty days. The statute fixes that time, but he was sent, and we were to get him back here and go to trial.

I can't keep rescheduling and rescheduling. I am now loaded up with two two-month trials back to back. It can't be done. Now let's go into 4244.

MR. GOLDBERG: Mr. Kenney tells me you don't have a report; is that correct?

THE COURT: He knows what is contained in the report. Theman is competent to stand trial, and he has been faking, and your psychiatrist appointed to examine him said that he looked competent but they didn't really have anough time, and in order to test it, they needed more time.

We gave more time, and they found out that -- both your psychiatrist and the government's psychiatrist agreed

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this fellow is competent. There is no need for a hearing after that point, because his psychiatrist now can't take the stand and say he is incompetent. We did exactly what he said should be done.

MR. GOLDBERG: Just so the record is clear, defendant McCluskey presses, as he must, for a hearing.

THE COURT: I am not saying that. I am just reading this. If the report of the psychiatrist indicates a state of present insanity, the Court shall hold a hearing.

The court report shows that he is competent to stand trial. His own psychiatrist indicated he thought he was competent to stand trial, and the government's psychiatrist, aside from the prison hospital, said he was competent to stand trial.

In the Marshall case in 458 F. 2nd at 446, that indicates that a hearing is necessary only if the report indicates a state of incompetency. I see no basis for holding a haring. Do you, Mr. Kenney?

MR. KENNEY: No, your Honor.

MR. GOLDBERG: I see a basis for at least bringing the defendant here for your Honor to talk to him.

THE COURT: I am not going to shut him out. I am going to get him here tomorrow sometime. When can we get him here so we can have Mr. Goldberg present, Mr. Kenney? It won't take

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more than ten minutes to clear this matter up.

MR. KENNEY: I am having him brought over in the morning, your Honor, so any time during the day he will be here.

THE COURT: What would you say, Mr. Goldberg, at recess or luncheon time?

MR. GOLDBERG: Yes, 1 o'clock. I will ask Judge Knapp at ten to one to recess, and I will come up here at ten to one.

THE COURT: All right, have him here. You be here at ten minutes to one so that when you walk in we can get rid of it.

MR. GOLDBERG: I will be here.

THE COURT: You can then make the motion on his behalf for a hearing,which I will deny.

MR. GOLDBERG: But, your Honor, I feel very strongly that if a man is to go to jail for the rest of his natural life, that elementary fairness requires whatever your Honor can do -- I know it's an imposition on your schedule that you wouldn't do for a counterfeiting case, although I know you would for other cases also, but this is such a serious case, your Honor, and I have done -- I have bombarded your chambers, as you know, with motions one after another; and now to tell him to

mb10

go get himself another lawyer, I feel it's unfair to him.

THE COURT: I can't do it because I don't have the time. I am actually booked up, and I am trying to get rid of this case since last summer. I have already scheduled cases. If you are not ready on the tenth, I have scheduled other cases. Once I get into January I have two weeks of motion part. I can't try a jury case. I have a case scheduled for January 21st. I will be away the week of the 28th because I am chairman of the Magistrates Committee, Judicial Conference.

That meeting must be held that week because it's the last possible time in order to meet the scheduling of the Judicial Conference hearing. So on February 20th I am back, and I have two multiple defendant cases set up, and I can't change them. I have sixteen counsel in one case, fifteen counsel in the other, and they were put so far in advance that nobody can say they have an engagement.

I can't reschedule that. I would have to call sixteen defendants and sixteen lawyers in one case. It is impossible.

MR. GOLDBERG: Did you say the first two weeks in January you were tied up?

THE COURT: I am in Part 1. I can't try a criminal case in Part 1.

MR. GOLDBERG: The only thing I say, and I know it

mbll

is late, it's strange to say, but I don't know who makes the schedule, but that one week you couldn't swap? After all, I have never had a murder case in this courthouse. It's rare, your Honor.

THE COURT: But I can't get a judge to swap with me because I don't have a week to give him. YOu get into February 20th until the end of May or the middle of June I have two trials. I have no judges around I can operate with to take a week.

Mr. Kenney indicates this case can go over a week.

MR. KENNEY: That's correct, your Honor.

Your Honor, may the government be heard on Mr. Goldberg's statement that we have in fact changed what he called the deal?

That is not accurate. Mr. Goldberg came to me after I had spoken to him several times prior to the 17th of September at counsel table after your Honor had come to the courtroom, and asked if his defendant could still plead to second degree murder;at that time I said yes, but he must cooperate.

MR. Goldberg went away and looked back at me and nodded like that on the 17th of September.

Subsequent to that date, Mr. McCluskey's brother, as your Honor knows, was indicted,and Mr. Goldberg asked me if we were going to require his cooperation in the trial if his

mb12

brother was a defendant at the trial.

We said no, he would not, but he would to cooperate as to other cases. We don't consider that any kind of a change or a change in the offer that was originally made. Our position is the same. Our position is the same as to each defendant.

MR. GOLDBERG: Your Honor, I don't want to quarrel. The fact is we are stuck with it. I won't say last Friday Mr. Kenney came into the courtroom at 110 and said something like, "Well, you should have taken the plea back in September." That was my best recollection.

MR. KENNEY: That is just inaccurate, your Honor. I never said anything like that.

THE COURT: I couldn't take a plea in September.

MR. GOLDBERG: Maybe it's not fair to Mr. Kenney. If he says it's inaccurate, of course I am in the midst of a very hectic trial, and I will take his recollection. I thought that is what he said.

But be that as it may, I think he recognizes that his request now of McCluskey is different, or maybe I am wrong, than what he had requested when I offered to plead guilty.

If I am wrong, wasn't there some conversation between the two of us -- I am asking through the Court -- just recently in which there was some acknowledgement that the

mbl3

deal had shifted a bit?

MR. KENNEY: Not that I know of.

THE COURT: I completely dissociate myself from any talks of deal.

MR. GOLDBERG: That is an unfortunate use of language, but I will be up here at ten to one and --

THE COURT: You see, you say Carroll agrees. I don't know that Carroll agrees to put it over. I don't know. If I took the two weeks off, the 31st of January, the 7th and 14th, do you have any objection if Carroll agrees, Mr. Kenney, if I can work it out -- I don't know if I can get a judge to take my part -- to do it the 14th?

MR. KENNEY: 14th of what month, sir?

THE COURT: January.

MR. KENNEY: We do, your Honor. I don't suppose we can press it very strongly, but we were prepared to try this case on the 10th of September, and we are anxious to try it.

THE COURT: So am I.

MR. KENNEY: If the Court decides it's necessary --

THE COURT: I think three weeks time to get an attorney to prepare for this case is adequate time to prepare.

All right, see you tomorrow.

(Adjourned to Tuesday, November 20,1973, at 12:50 p.m.)

mb14

UNITED STATES OF AMERICA November 20, 1973

v. 73 Cr. 1855

VINCENT McCLUSKEY, et. al.

Before: HON. CHARLES M. METZNER, District Judge.

Appearances: John J. Kenney, Esq., Assistant U. S. Attorney.
Jay Goldberg, Esq., Attorney for defendant.

THE COURT: Mr. Goldberg, I had my law clerk call Mr. Schreiber yesterday afternoon, and he says he will not be through with his case until December 10th. You tell me November 30th.

MR. GOLDBERG: I said two weeks from Friday. He told that to Judge Knapp. He may have seen new things.

THE COURT: Last night he informed my office it would be December 10th.

MR. GOLDBERG: Yes. Well, I have to accept it.

THE COURT: Obviously, you can't continue in the case.

MR. GOLDBERG: Just so -- I am prepared to try the case when I finish Judge Knapp's case. I have worked interviewing witnesses over the summer, making perhaps some five or six motions to this court. I have been in the field doing things, an investigator would normally do, and I feel I have a grasp of the case, should the defendant proceed to trial.

mb15

THE COURT: I have other men in this case. Direnzo, I can't keep him tied up. YOu can't find him. Kenney tried to get him, couldn't get him, sent telegrams. You say you can't get him. I had to find him in the courthouse and tell him the case was adjourned until December 10th.

MR. GOLDBERG: I found him.

THE COURT: You did not. I found him in the courthouse in from of Room 128.

MR. GOLDBERG: Forgive me. That night when I left your courtroom, I called him.

THE COURT: You didn't tell me. I saw him the next morning when I walked in,with Mr. LaRosa standing in front of Room 128, and he didn't know anything about it.

MR. GOLDBERG: Judge, I called --

THE COURT: I came upstairs and I told my law clerk totell Kenney that I can find him but Kenney can't.

MR. GOLDBERG: I called one of your law clerks.

THE COURT: He did not get any message from you bythe time I got upstairs that morning. I saw LaRosa standing with Direnzo in front of Room 128 as I walked in the courthouse, and he looked surprised. He said, "All right, if you want December 10th, but I can't keep myself tied up any more." Everybody is yelling for the man, Bronx, Brooklyn, New York, Eastern District, Southern District.

mbl6

MR. GOLDBERG: Of course, this case, I hope Mr. Schreiber relayed to your law clerks that was scheduled for four to six weeks.

THE COURT: That is not what Judge Knapp tells me. Judge Knapp told me in the lunchroom last week that you knew the end of July that this case was scheduled to start in October and would go to January.

MR. GOLDBERG: That is -- you know, you put me in a terrible position.

THE COURT: I have to, because you are making statements that are contrary to what a colleague of mine says.

MR. GOLDBERG: The case is scheduled for four to six weeks. The prosecutor said that. Now, that's it. I was there. Somebody else says anything to the contrary, I told you last night, when I had a disagreement with Mr. Kenney, I was man enough to say he is probably right, because I have just come up from the courtroom, and I wasn't thinking that clearly.

But Mr. Schreiber said four to six weeks, and that is it, and I wouldn't care, your Honor, most respectfully, if the whole courthouse lined up. That is what Mr. Schreiber said.

THE COURT: I am sorry; you say that to me, and somebody else says something different. Last night you told me that the U. S. Attorney said he'd be through next Friday, the 30th; and I

mb17

promptly called him up. He said December 10th.

I am not going to chase both of you around, and it is not my job to do so.

MR. GOLDBERG: I told you Friday the prosecutor said another two weeks he would be through.

THE COURT: That is November 30th.

MR. GOLDBERG: Yes.

THE COURT: He told me last night, twenty minutes after I spoke to you, that the date is December 10th.

MR. GOLDBERG: I spoke to him Friday.

THE COURT: All I am telling you is I am not going to spend my time finding out whether you are telling the truth or Mr. Schreiber is telling the truth or Judge Knapp is telling the truth. All I know is I can't take the chance that anybody can be wrong.

I have adjourned this case several times. The original date was September 10th. You came into the case, and you asked to have it so you could come into the case, so we obliged you.

MR. GOLDBERG: Right.

THE COURT: Then you knew on September 4th that you had this problem regarding your client; I think it was August 31st, rather, that you knew of it. YOu sent some motion papers which I received on September 6th.

The trial was supposed to start,at that point, I

mb18

think, on the 17th. So we appointed a doctor to examine him. In fact, since I was leaving that afternoon for the Judicial Conference, I had to get hold of Judge Duffy and alert him that the order would come up, so we could get the doctor appointed quickly, and possibly not have to move this case over.

Then you waited until September 12th at which time you called and you said you wanted to see Abrahamsen's report, and perhaps you wanted your own doctor. That was, of course, a week after you had sent in the motion papers, so we appointed your doctor.

Now we get reports from both Kenney and Nathanson on the dates set for trial, and it is perfectly obvious that because of the lack of definiteness in their report, because they both indicate they think the defendant is competent to stand trial, still they feel that perhaps there ought to be more time. So we send the defendant to Springfield for a thorough examination, and Direnzo is told to keep himself free. The lawyer who represents Rippy says he has a case, a murder case in the Bronx ready for trial for some time.

I tell him he has to keep himself free, but I can't hold him too free because he had to actually go to trial. We move it over to December 10th now, so he is free and Direnzo is free, but I can't keep rearranging trial dates -- Impossible.

mb19

So if you can't represent him -- and now, Mr. McCluskey, I am addressing you -- I have not seen the written report from Springfield yet, but they claim that you are prefectly sane to stand trial, and that you are a malingerer -- that is what I understand is in the report.

MR. GOLDBERG: But the defendant presses for a hearing to confront the report.

THE COURT: I will accept that motion. I will deny it, and I will deny it on the basis that Dr. Portnow, your psychiatrist appointed to examine the defendant at his request, indicated originally that he didn't think he was, but he thought he needed a little more time; and that further tests should be run.

Those tests have now been run and confirmed by Springfield, so we have Dr. Abrahamsen, Dr. Portnow, and Springfield in agreement. There is no need for a hearing. The record is clear.

MR. GOLDBERG: your Honor, you had discussed last night thepossibility of perhaps trying this January 14th. Have you abandoned that?

THE COURT: I can't do it because I am not going to chase Direnzo any more. I can't find the man. YOu can't find him. Kenney can't find him. He sends him telegrams.

I have to tell him I am going to send marshals

mb20

after him.

MR. GOLDBERG: Judge, I called him at his home the night I left your courtroom, and I said, "Mike, I am calling you to tell you if you don't want to get in custody, call Judge Metzner the next morning."

That morning at 9:30 I spoke to one of your law clerks and told him of that, and I said, "Judge Metzner will be getting a call from Mr. Direnzo." I have done all I can.

I called and spoke to Mr. Direnzo at his home.

THE COURT: But you haven't got him before.

MR. GOLDBERG: That is true. I didn't call him at home. I only called him at the office.

THE COURT: That is my point, Mr. Goldberg. You don't move properly. YOu knew on August 31st the problem with the defendant. I don't get motion papers until September 6th. The trial is coming up. You don't move expeditiously knowing this trial is coming.

MR. GOLDBERG: I thought I moved -- I was proud of how fast I moved. August 31st is a Friday. I moved on what day, your Honor?

THE COURT: September 6th I received your papers.

MR. GOLDBERG: You mean the -- I saw him on August 31st and I didn't move till the 6th?

THE COURT: That is when I got the papers, and they were sent through the mail. They could have been hand deliver-

mb21

ed just as easily. You could have called up just as easily, and I would hve informed Mr. Kenney to get a psychiatrist immediately; but it dragged and dragged. Then on the 6th you made the motions.On the 12th you then for the first time want your own psychiatrist.

MR. GOLDBERG: Well, the family had asked. I was satisfied to have the Court appoint an independent doctor as its expert. It was when the family called at night to say that they wanted their own doctor appointed.

I was content to rely on the report of any doctor that this Court chose, as opposed to the prosecutor; and I understood you chose a doctor that would have been all right with me; but the family asked me; it wasn't my idea.

On the other hand, as an advocate, I must honor any lawful or ethical request of the family.

THE COURT: I granted it.

MR. GOLDBERG: And you granted it.

THE COURT: All right, but we are now down to the end of pushing it off.

MR. GOLDBERG: Let me say this to your Honor: This is the first time I have been in a situation with so many problems and inconveniences caused to the Court and to government counsel. It's true; I want you to know I am not horsing around; I am down there in 110 every day. The question is, if I

mb22

spoke to Direnzo tonight --

THE COURT: I can't ask Direnzo or any other Court in the city to keep him free any more. I can't ask Hafetz or any other court in the city to keep him free any more. I can't do it. We have done it now twice, and this is the end of it. I just can't do it. I went through this in the Rosner case. I made calls to judges, and all I got was abuse from the Court of Appeals. "Go try him," they said, " don't wait."

And the case clearly says that you have no right to take a case which will prevent its being tried. It's simple.

MR. GOLDBERG: Judge, when I took it, I want to tell you something, I came to court on the 17th and I had my whole opening statement all typed out; I was ready to go.

I thought that Portnow had not supported -- I thought we were going to trial. I had the whole opening statement.

THE COURT: You didn't think that I could possibly take a plea from your client with the Abrahamsen and Portnow reports in the shape they were in and not be inviting a 2255 six months later?

MR. GOLDBERG: I have no quarrel with what the Court did. I thought you were going to hold -- in fact, the minutes will show I said perhaps you should hold a hearing; and then, hadyou denied my claim, the plea would have been taken.

THE COURT: I couldn't hold a hearing, and the record will show that I did say the reports would indicate that if they took the stand, they would say they needed more time.

MR. GOLDBERG: I see. I have no quarrel with what the Court did, but I did say, I registered, I am quite sure, even to the prosecutor, that I was surprised that he was sent to Springfield. I had my opening statement prepared. I was ready on the 17th.

So when you say I took a case that I couldn't try, it's true I couldn't try it on the 10th, but I could have tried it on the 17th.

THE COURT: You could, but now, when your client was sent to Springfield, you must have known he'd be back in a month or so, and we were pushing this case for trial.

At that point, we come back to what I said the other day: you had an obligation to tell me September 17th that you would not be free to try this case in January.

MR. GOLDBEFG: Your Honor, if I could show you a record reference where he said four to six weeks and the trial will start October 17th -- I thought toward the middle or latter part of December I would be free. Mr. Kenney at that point was talking about a five-day trial, and it would have been easily slipped in.

mb24

THE COURT: All I can tell you is what Judge Knapp told me. I can't go behind it. I am sorry.

MR. GOLDBERG: I don't blame you.

THE COURT: I don't know if you are going to be free now because now Mr. Schreiber tells me, twenty minutes after you tell me the date is November 30th, he now tells me December 10th.

MR. GOLDBERG: He may have other things up his sleeve.

THE COURT: I don't care but I can't --

MR. GOLDBERG: He may have additional proof.

THE COURT: But don't you understand, I can't sit around worrying about whether you are correct in your estimates or he is correct in his estimates? I have the assistant who has other work to do. I am loaded up to my ears right now, scheduled through the end of May, and I have Direnzo, whom everybody is calling for, who is in court every day, and the same with Hafetz. I just can't do it any more.

MR. GOLDBERG: All I want your Honor to know is the statement I took the case knowing I couldn't try it is true only with respect to September 10th, but your Honor favored me with an adjournment. I was ready on September 17th.

THE COURT: But once after that you weren't ready.

MR. GOLDBERG: Until October 17th I was free, your Honor.

mb25

THE COURT: How could I do that when the man had to go out and be examined by doctors administering tests that your own doctor said had to be administered, in order to get a definitive conclusion as to Mr. McCluskey's ability to stand trial? That has now been resolved. Mr. McCluskey is able to stand trial. There is the Springfield report. There is Dr. Abrahamsen's report, and there is a report of your psychiatrist, Dr. Portnow.

The record is clear on that. That is now taken care of. We will have to proceed on December 10th.

Mr. McCluskey, that means you are going to have to get yourself another lawyer. You are in touch with the family, I assume, Mr. Goldberg?

MR. GOLDBERG: Yes.

THE COURT: I gather they hired you. That is what you indicated to me when you originally came in.

MR. GOLDBERG: That is right.

THE COURT: Today at the end of the day you will have to get in touch with the family and report to me tomorrow what they say. Obviously, this man is in jail and can't get himself a lawyer, and since the family brought you in, I assume the family will have to bring the substitute attorney in.

MR. GOLDBERG: The family didn't pay. I mean the family may not have the funds. I will get back to you, because

mb26

they didn't have the funds for the entire fee. On the other hand, what was paid to me will not be returned.

THE COURT: Hopper was in the case. He was retained privately.

MR. GOLDBERG: That is true, but money runs out, your Honor.

THE COURT: I don't know who hired him, but there is somebody doing the work of hiring here. If they can't hire an attorney, he can file the affidavit and I will appoint one for him, but the case is going forward December 10th, and you tell that to the family, and they must get another lawyer and get him immediately, and December 10th is the date.

MR. GOLDBERG: My obligation, I will call the family and tell them what your Honor said. I don't want to to be construed I am just deferring to your Honor's ruling, as I must, but I feel very strongly that this deprive the defendant of his right to counsel of his own choosing.

THE COURT: YOu told me that last August when you came in.

MR. GOLDBERG: Your Honor, these unfortunate circumstances I feel that we could make --

THE COURT: I had Mr. Edelbaum and three or four others, and I deferred, and I was chastised.

MR. GOLDBERG: But we can't be held responsible.

mb27

I don't know what happened. You put me on an unfavorable ground to argue; I don't know what the situation was there. Perhaps the lawyers didn't consent or the clients didn't waive. I don't know what happened in Rosner.

THE COURT: I was all set to go , but they were all tied up from March until November, and the court said, "If you can't try the case in a reasonable time, too bad, get another lawyer." Now, there has been a reasonable time here.

MR. GOLDBERG: Suppose theprosecutor is finished by December 10th and I am available December 13th or 14th.

THE COURT: I can't take the chance. I can't take the chance waiting for whether you are going to be free or not. I can't get to the lawyers. I have other cases to try that I must schedule. I can't run the calendar for your benefit.

MR. GOLDBERG: The result then is that a man who faces a mandatory life sentence doesn't have counsel of his own choosing. I am not asking you to do this in an ordinary case, but this is an exceptional situation.

THE COURT: Any man who faces going to jail loses liberty. If it's ten years or fifteen years under the narcotics acts, why not --

MR. GOLDBERG: That is quite serious, but mandatory life is perhaps the worst crime.

mh28

THE COURT: I am sorry, I can't sit around juggling between a lot of lawyers and a lot of cases.

MR. GOLDBERG: Is there anything that can be done toget us an early January date, your Honor?

MR. KENNEY: Your Honor, if I may --

MR. GOLDBERG: If the government doesn't want it, then --

MR. KENNEY: I think it's been lost sight of that the delay here, we believe the report from Springfield will further emphasize, was caused by the defendant faking. This delay is caused -- we didn't go to trial September 17th or shortly thereafter because this defendant, as we have every reason to believe the doctors' report from Springfield will support, was pretending to have a mental ailment that he did not have; and I just think that Mr. Goldberg's argument loses track of that when he says this man is not having the counsel of his choice.

MR. GOLDBERG: I will let that -- I am in no position to say whether he is faking or not. I just registered to your Honor my feeling that today the defendant doesn't speak to me, and yesterday, when I went to see the defendant, he doesn't talk to me, and if he is faking, he's dug himself his own grave. If he is not faking, he is sick. I have no way of knowing except what Mr. Kenney says, but I want your

mb29

Honor to know that you have criticized me unjustly about my trial schedule, and I have tried to answer you with respect to that. The defendant's faking is certainly not chargeable to me. I was prepared on the 17th, and I wish, if he were faking --

THE COURT: On your point, there are two phases. In the first, I tried to accommodate you even though I wanted to try this case in the Summer. Mr. Kenney knows that.

MR. GOLDBERG: That's right.

THE COURT: My schedule was clear. I wanted to try this in the summer. Then we went over to September, so then we fixed a date agreeable to you. Then we get Hafetz with a murder trial which we told him to get rid of, while the defendant was out having his examination, so that he would be free again. That has now occurred although it could not be done by the 26th. He is actually on trial.

To get Direnzo is out of this world, and I am not going to chase Direnzo all over the lot, and I am not going to keep bringing him in here personally to make sure that he is free, and I am not going to answer entreaties from other courts saying they want this man, and he keeps telling them, "I am on trial before Judge Metzner; I have an actual engagement." I am not going to do that. I can't do that.

MR. GOLDBERG: I can very easily get hold of Direnzo.

mb30

THE COURT: It hasn't been true in the past, Mr. Goldberg.

MR. GOLDBERG: I called him that night. I told you I would, and your law clerks had a call from me at 9:40, 9:35.

THE COURT: He comes in and says he is busy in other places. I am not going to do it. I can't just keep doing this.

MR. GOLDBERG: If we had a January date, would that be agreeable to the Court?

THE COURT: I won't rely on Mr. Schreiber.

MR. GOLDBERG: January, I said, your Honor.

THE COURT: The only time I could try it in January would be January 2nd, 3rd.

MR. GOLDBERG: That would be fine, if it's agreeable to the government.

THE COURT: If you can bring Mr. Schreiber and Mr. Hafetz and Mr. Direnzo in here this afternoon, and tell me that that is all right with them and their clients, especially Direnzo, because you have a six-month rule, do you not?

MR. KENNEY: That is correct.

MR. GOLDBERG: I don't know that I could do it this afternoon.

THE COURT: I can't fool around any more. I want a lawyer for him in a hurry. I am not going to waste time

trying to reschedule it in and finally come to a conclusion a week from now that we can't do it, and you say, "Well, now the time is too short to get him a new lawyer."

MR. GOLDBERG: Your Honor, I will start the ball rolling today on new counsel. I will tell the family over my objection -- the record is clear -- I am only deferring to your Honor's ruling.

THE COURT: That's right.

MR. GOLDBERG: But I strongly object to it, or except to it, or whatever the language is; but I will get the ball rolling this afternoon by calling Mrs. McCluskey.

THE COURT: That's right.

MR. GOLDBERG: So you will know that as of this morning --

THE COURT: You let me know tomorrow and tell her I must know tomorrow if she is getting new counsel for trial on December 10th or not; and if she is not getting one because they don't have the funds, let them sign an affidavit.

I want to appoint a lawyer tomorrow. I don't want to wait till next week.

MR. GOLDBERG: I will call up Mrs. McCluskey, and I will call Direnzo tonight, and I will try to reach Hafetz tonight, and I will have a report tomorrow for the law clerks at 9:30.

mb31a

THE COURT: Good, but don't forget to let Mrs. McCluskey know about it, because then you are going to be sitting back and I won't stand for any more delay.

MR. GOLDBERG: I will tell her what your position is though I object to it.

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mb32

UNITED STATES OF AMERICA

v. 73 Cr. 855

VINCENT MC CLUSKEY, et. al.

November 27, 1973.

Before: HON. CHARLES M. METZNER, District Judge.

Appearances: John J. Kenney, Esq., for the Government.
Edward Panzer, Esq., for the Defendant.

THE CLERK: U.S. against McCluskey, et. al. Government ready?

MR. KENNEY: Government ready.

THE CLERK: Attorney for defendant McCluskey ready?

MR. PANZER: Your Honor, Mr. McCluskey is here. I am prepared to represent him, if your Honor will assign me, and then I will confer further with him and advise your Honor.

I understand this case is set down for trial for December 10th.

THE COURT: I want to make the record perfectly clear as to what went on here. On Tuesday, November 20th, Mr. McCluskey appeared in the courtroom with his attorney, Mr. Goldberg. I had several conferences with Mr. Goldberg prior to that date in which I clearly indicated this case could not be put off any longer to satisfy his other trial

commitments, and that I would have to go forward on December 10th. His trial commitment, it turns out, was, according to Judge Knapp, known to him last July, at which time, Judge Knapp informs me, everybody in the trial that was to take place before him knew the case would start in the middle of October and go to January of next year.

Consequently, when Mr. McClusky returned from Springfield last week, I had him in immediately upon his return, along with Mr. Goldberg, to clarify what the condition was.

At that time, Mr. Goldberg indicated he thought the case before Judge Knapp would be over November 30th. However, when I spoke to the assistant United States Attorney in that case, he informed me that the matter would continue at least until December 10th before the defense even started.

I should mention at this point that further delay is obvious in that case because one of the defendants had a heart attack, and the case now has been adjourned. I don't know when it is going to be picked up.

In any event, it shows the complete unavailability of Mr. Goldberg to try this matter.

I cannot put the matter over any more. We have adjourned it several times, once specifically at Mr. Goldberg's request back in September, and the second time, of course,

mb34

to permit Mr. McCluskey to be examined by the doctors at Springfield. However, even upon his return, Mr. Goldberg was not prepared to proceed, but December 10th is the trial date, and I have been informed by Mr. Goldberg that Mr. McCluskey's family and Mr. McCluskey did not have the money to hire an attorney.

MR. Goldberg was asked to come here today but he informed my chambers this morning that he was taking his mother to the hospital and couldn't be here.

The reason I have asked you here, Mr. Panzer, along with Mr. McCluskey, was to make it absolutely crystal clear that, A, I wish a statement on the appropriate form from the defendant as to his condition; and B, that I will appoint you to represent him; and C, that the trial will go forward on December 10th without any adjournment, and that you have the time to prepare the defense in this case.

That includes Mr. Goldberg's active cooperation, and that should be made perfectly clear to him. He, in fact, succeeded some other lawyer who was in the case.

On that basis, Mr. Panzer, are you ready to proceed to represent Mr. McCluskey on the trial on December 10th?

MR. PANZER: I will be ready. The only question I wanted to ask your Honor was, I was told that that case would take only a week to try.

mb35

THE COURT: Maybe six days.

MR. PANZER: My only problem is that I have scheduled a trial on the 17th with Judge Motley, and I wouldn't want this to interfere with that.

THE COURT: You may have a day interference, but I am sure, with the importance of this case, Judge Motley would give you a day or so.

MR. PANZER: With that understanding, your Honor, I would be prepared --

THE COURT: I can't control it. Mr. Kenney represents that the government's case will take three days. I don't know what your client is going to do. I understand that there are some discussions betwen your to-be client and the government regarding a disposition, but that you will have to familiarize yourself with when you speak to the client now.

What I will do, Mr. Panzer, I will appoint you now, and ask you to please submit to me the affidavit of indigency. I am following this procedure on Mr. Goldberg's representation to my chambers that the family of Mr. McCluskey hasn't any money to hire a new lawyer, and that Mr. McCluskey knows and understands that the Court will appoint someone to represent him, and that such procedure is agreeable to him. Is that correct, Mr. McCluskey?

THE DEFENDANT: Yes, sir.

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MR. PANZER: Your Honor, I will confer with Mr. McCluskey, and I will submit the appropriate affidavit for your Honor.

THE COURT: All right. I want to make it clear that I tried to have this substitution arranged last Tuesday. It was put over to Wednesday, and then it was put over again because of conferences that were taking place between Mr. McCluskey and Mr. Kenney; but I just can't wait any longer, because if we do, then we are going to be met with a plea that there is not enough time to prepare, and of course, there will be no further adjournments of this matter.

MR. PANZER: Very well, your Honor.

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I (We) hereby certify that the foregoing is a true and accurate transcript to the best of my (our) ability and belief from my (our) stenographic notes of this proceeding.

Official Court Reporter
U. S. District Court

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United States of America
v
John Carroll

73 Cr. 855

Before: Hon. CHARLES M. METZNER, D.J.

For the Government: John J. Kenney, Esq.

Also present: John F. Martin
Robert C. Carey

New York, December 3, 1973
10:00 a.m.

- - -

THE CLERK: United States of America versus Carroll

MR.KENNEY: Government is ready.

THE COURT: I understand there was an attorney here for Mr. McCluskey.

MR. KENNEY: John F. Martin and Mr. Robert C. Carey with Mrs. McCluskey, the defendant. Vincent McCluskey's wife, I believe.

THE COURT: What is the application?

MR. MARTIN: If your Honor please, Mrs. McCluskey, the wife of the defendant, visited our office on Friday. I have known her before and most of her family and she indicated that she felt that her husband might possibly need new legal representation in this case that is now pend-

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ing.

She advised me that she had retained originally an attorney by the name of Mr. Goldberg, Jay Goldberg, and had paid him a substantial fee, and that some time last week he was relieved and another attorney was appointed by the Court. She discussed the matter with her husband, and she felt that he didn't feel that he was being represented, and she asked that we talk to her husband, with the possibility of being retained.

I told her that I would apprise the Court of the state of affairs and request the Court to speak with her husband, the defendant, and with the other attorney, to see if we can or should be retained by him.

THE COURT: That is perfectly all right with me, but there is one thing you must understand. The case is going to trial next Monday. Now I have made that perfectly clear all along now, and I will not allow last minute substitutions of attorneys to prevent the trial of this case.

MR. MARTIN: Well --

THE COURT: There are other defendants involved, and they have been in jail since June.

MR. MARTIN: It is up to your Honor, of course. But I have nothing -- as I said we first discussed the case

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on Friday. We haven't spoken to the defendant yet.

And I told her the only t-ing I could do, she felt he needs help in representation. I told her the only thing I could do is to approach the Court, explain the situation to the Court, and request permission to speak to Mr. McCluskey, to the present attorney and possibly make some arrangements for representation, whether we can, whether it would be compatible with the defendant, whether we'd be in a position to try it --

THE COURT: I am perfectly willing to allow you to confer with the defendant, and if he wishes to engage you, I will vacate the appointment of Mr. Panzer, obviously. But the one thing I want to say is, this trial will not be adjourned. And unless you are ready to go to trial next Monday, then I can't allow the representation.

MR. MARTIN: I haven't looked at the file or spoken to the defendants. I don't even know what is involved. I haven't even read the indictment.

THE COURT: Well, he is charged with murder.

MR. MARTIN: I would like to at least read that during the course of the day and then perhaps be in a position to know --

THE COURT: Do anything you want.

MR. MARTIN: Could we do this, if your Honor

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please, could we speak with the defendant and the previous attorney?

THE COURT: Mr. Goldberg is the fellow you want to talk to, not Panzer.

MR. MARTIN: I spoke to him on Friday and there was some question as to whether or not the file would be made readily available.

I presume that it will be.

THE COURT: It had better be.

MR. MARTIN: I mean without the necessity of having Mr. and Mrs. McCluskey sign papers and release --

THE COURT: I don't know, if you have any problem with that, we will bring Goldberg in here. I am not going through that nonsense.

MR. MARTIN: We'd like to look at the file. By the end of the day I'd know whether I'd be in a position to be retained, if that would be satisfactory to the Court.

THE COURT: All I am telling you is, if you wish to come into this case, and the McCluskeys want you to come in, that is perfectly all right with me, but you must be ready to go to trial Monday. Do you understand that?

MR. MARTIN: Well, if your Honor please, I understand what your Honor is saying, but I wouldn't be in a position to answer you until I have consulted with these

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people at the end of the day.

THE COURT: I am telling you now, if you are going to come back and tell me you cannot go to trial on Monday, I will not allow the substitution. Have I made that clear?

MR. MARTIN: That is up to your Honor.

THE COURT: Don't tell me it is up to me. I am telling you now, if you can't go to trial on Monday, I will now allow the substitution. Now I started on this substitution two weeks ago to avoid exactly what is happening here now. I did not want to be met at the last moment with another change of attorneys.

Now Mr. Kenney knows that. Is that right, Mr. Kenney?

MR. KENNEY: That is correct, your Honor.

THE COURT: Now I have had Goldberg in here, I have had Panzer in here, and everybody was set to go. Now you come in a week later, and I am just telling you that if you want to take this case, it has to be on the understanding that you must go to trial on Monday. Now if you feel you cannot be prepared by Monday to go to trial, after you have spoken to the defendant, and read the file, I will not allow the substitution. Now is that clear?

THE COURT: Well, I could let your Honor know at the end of the day after I have spoken to the client.

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THE COURT: I merely say, do you understand what I am saying to you?

MR. MARTIN: Yes, and I would like to assure Your Honor that I am not down here this morning for purposes of delaying this trial.

THE COURT: I am not even suggesting that, Mr. Martin. I just want you to understand what my position is in the case.

MR. MARTIN: I can understand your Honor's position but I want to be clear that I am not here --

THE COURT: Mr. Martin, Mr. Martin. I am only asking for a yes or no answer, not a speech. Do you understand what I have said.

MR. MARTIN: I understand what your Honor has said.

THE COURT: Thank you. All right. When you are ready to come back, notify my chambers; I will be available tomorrow morning at 10 o'clock.

MR. MARTIN: Thank you.

MR. KENNEY: If I may, your Honor, I told Mr. Martin that both Mr. Goldberg and Mr. Panswer, to my understanding, are here in the courthouse today.

In addition, we will have Mr. Vincent McCluskey brought from West Street to the courthouse so he will be here this afternoon.

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THE COURT: Bring him here as quickly as you can so Mr. Martin may confer with him, and get hold of Goldberg, whom I think is before Judge Knapp.

MR. KENNEY: That is correct.

THE COURT: And arrange for Mr. Martin to speak to him here in the courthouse as quickly as possible. Thank you. I don't think -- has Mr. Panzer been in the matter? Maybe you'd better get hold of Panzer, too, if you can, but it is more important for Mr. Martin to speak to Mr. Goldberg.

MR. KENNEY: Yes, your Honor.

THE COURT: (Continuing) Than it is to Mr. Panzer, because Mr. Panzer is the court appointed attorney -- and incidentally, appointed on the representation that the family couldn't afford to hire counsel. All right.

MR. MARTIN : Thank you, your Honor.

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I (We) hereby certify that the foregoing is a true and accurate transcript to the best of my (our) ability and belief from my (our) stenographic notes of this proceeding.

John H. Kruppel

Official Court Reporter
U. S. District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

vs. 73 Cr. 855 and 73 Cr. 972

THOMAS J. CARROLL, VINCENT McCLOSKEY, and WILLIAM McCLOSKEY,

Defendants.

----------x

U. S. DISTRICT COURT
FILED
FEB 14 1974
S. D. OF N. Y.

Before:

HONORABLE CHARLES M. METZNER,

District Judge.

New York, N.Y.
January 25, 1974

APPEARANCES:

Paul J. Curran, Esq.,
United States Attorney
For the Government
By: John J. Kenney, Esq.,
Assistant United States Attorney

John F. Martin, Esq.,
For Defendant Vincent McCloskey.

Louis F. Mascaro, Esq.
For Defendant William McCloskey.

Defendant Thomas J. Carroll,
Pro Se.

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(Case called.)

THE COURT: Is the Government ready?

MR. KENNEY: Government is ready.

THE COURT: Is defendant Carroll ready?

MR. MARTIN: If your Honor pleases, may I address the Court?

THE COURT: Yes.

MR. MARTIN: If your Honor pleases, Mr. Direnzo recently suffered another heart seizure.

THE COURT: Mr. Direnzo has sent a letter to the Court in which he joins in all motions that you have made on behalf of the defendant Vincent McCloskey. The letter will be made part of the record.

MR. MARTIN: Fine. The defendant Vincent McCloskey is ready.

THE CLERK: Attorney for defendant William McCloskey?

MR.MASCARO: Yes, your Honor. May I address the Court, your Honor?

THE COURT: Yes.

MR. MASCARO: My name is Louis F. Mascaro. I am an attorney from 38 New Street in Huntington, Long Island. I have recently been consented to by Mr. Hopper and by the defendant William McCloskey to appear in the place and stead of Mr. Hopper at all stages of the proceeding from this

point forward. I know that the Court does not have the consent and the substitution stipulation as yet because Mr. Hopper said he only mailed it yesterday afternoon.

I can say for the record that I am duly substituted; Mr. Hopper has consented. I have talked to him only by telephone. I havenot seen him in person. I do not know him prior thereto, but I have reason to believe that he has acknowledged and consented for my appearance in this matter and to be substituted.

THE COURT: I will accept it.

MR. MASCARO: I beg your pardon?

THE COURT: I will accept the substitution on your representation.

MR. MASCARO: Thank you, sir. I am ready for the sentencing.

THE COURT: Before we do that, I have two sets of motions here. At the time the jury verdict was rendered, the defendants reserved their right to make motions until the day of sentence. I modified that by stating that they had to submit their papers by January 23rd, which has been done on behalf of the defendant Vincent McCloskey, on behalf of William McCloskey appearing pro se; I assume you have read his motion papers?

MR. MASCARO: Yes, I am aware of it and I am familiar with it, sir.

THE COURT: And Mr. Direnzo, on behalf of the defendant Carroll, by virtue of the letter to which I have just referred in which he joins in all motions made by Mr. Martin.

I see no reason to have argument on the motions. Mr. Martin's motion runs about nineteen pages. I have read it all, and everything that he refers to in the motion papers is already in the record. It is merely a compendium of what already appears in the record, and there is no point in having additional oral argument on it.

I received no papers from the Government, Mr. Kenney.

MR. KENNEY: That's correct, YOur Honor. We obviously oppose the motion. We didn't actually receive the papers on the 23rd. I did not receive them until the morning of the 24th. I was unable to respond.

However, there are just one or two things we would like to note for the record, if we may.

THE COURT: You may.

MR. KENNEY: The first is that the requests --

THE COURT: Pardon me. Before you proceed, the motion papers I have are copies. Does the court record have the originals?

(Papers handed to the Court.)

THE COURT: All right.

MR. KENNEY: The first is, your Honor, that the request to charge second degree murder as a lesser offense was never made by any of the defendants. No exception was made to the Court's charge, and if such request had been made, we would have opposed it because we consider it to be improper on the facts of this case; and we rely for that position principally on Fuller v. United States, 407 Fed. 2nd 1199. That is a District of Columbia Circuit case in 1968.

Mr. Martin says in his moving papers that the Government prejudiced the defendant by saying in its opening statement it would prove the defendants were bad men. We have checked the record, and that doesn't appear any place in the prosecutor's opening statement.

In that statement I did say that the Government's witnesses would not be nice people. I believe that may be what heis referring to. We don't consider that to be an unfair statement.

With regard to the defendant Mike McCloskey's representation by counsel, and his oral statement which came into evidence through Mr. Keever, the Government relies on the transcript of December 8, 1973, and the Court's opinion filed on December 22, 1973.

Mr. Martin says that in a two-pronged attack, that he

was unable to get witnesses, and that the Court incorrectly told the jury that some witnesses were equally available to both sides. In regard to that, your Honor, the Government made every effort to use the subpoena power to get witnesses for Mr. McCloskey. In fact, we had over fifteen witnesses under subpoena. When we subpoenaed a witness and the witness responded, we let Mr. Martin know and gave Mr. Martin that witness's telephone number so that he could contact him.

As far as I know, there is no request by Mr. Martin to the Government with regard to any witness that went unanswered, and there was no witness who he was not able to at least locate.

Thank you, your Honor.

THE COURT: Yes?

DEFENDANT CARROLL: I want to submit these additional motions.

THE COURT: I can't take them now.

DEFENDANT CARROLL: Your Honor, I am in segregation. I am unable to get to my attorney due to his illness, and in that case, I would like to postpone the sentencing until my attorney is ready.

THE COURT: He said he can proceed on Mr. Martin's motions.

DEFENDANT CARROLL: I object to it, your Honor.

THE COURT: Objection is overruled. You have had a whole month to do this, Mr. Carroll.

DEFENDANT CARROLL: No, sir.

THE COURT: Mr. Martin's motion I will make certain references to. On page 1 he says the indictment lists as overt acts three inoccuous meetings and no criminal activities per se.

As I pointed out at the time of the charge, the law is perfectly clear that the overt acts need not be criminal acts per se, but can be as innocent as making a telephone call.

Mr. Kenney has answered the charge concerning the failure to charge the jury regarding the lssser charge of murder in the second degree.

There is a statement on page 5 of Mr. Martin's affidavit which reads, "when Mr. Goldberg was retained as attorney of record, Mr. Hopper continued to function for the defendant as co-counsel."

The record will show on August 6th Mr. Goldberg informed the Court that Mr. McCloskey wantedhim -- meaning Mr. Goldberg -- substituted for Hopper, but the trial would have to be adjourned for one week for him to be available to try it.

Mr. Goldberg was instructed to get permission from all defendants and their counsel, before filing the order of substitution.

On August 7th, the following day, the transcript will show that Mr. Goldberg submitted the order of substitution which I signed that day. It granted the defendant Vincent McCloskey's application, "to have substituted as his attorney of record Jay Goldberg, Esq., in place and stead of Donald Hopper."

That would indicate that Mr. Goldberg superseded Mr. Hopper at Mr. McCloskey's request, not to add as co-counsel.

Finally, I should say the record will show that pursuant to the agreement, the trial was adjourned for another week so that Mr. Goldberg would be free to carry out the substitution that Mr. McCloskey desired.

On page 6 of Mr. Martin's affidavit, he states as follows: "The record shows threats by the Court to summarily summon the attorney for the defendant before it by the U.S. marshals despite the fact that the attorney was actively engaged on trial before Judge Knapp in this same courthouse."

I think Mr. Martin is under a misapprehension. He is referring to the conference of November 13th, of which there is a transcript in the record, and I made a comment about sending a marshal for Mr. Direnzo, not for Mr. Goldberg,

because Mr. Direnzo had failed to return the phone calls made by my office to his office.

Mr. Goldberg was present because he was in this courthouse on a trial before Judge Knapp.

At the bottom of page 6, Mr. Martin states in his affidavit, and I quote: "The Court rejected an offer to try the case in January by Mr. Goldberg. Instead, the Court said it was going to proceed on December 10th and specifically instructed Mr. Goldberg to tell the defendant's family that they must obtain new counsel."

What happened there was that Mr. Goldberg said he could try the case in January, and I agreed that I would try the case in the beginning of January.

I even went to the extent of conferring with Judge Frankel to switch my assignment for the first two weeks of January, which was in Part 1, to sit in Part 1 in December, and he would take my January assignment so that I would be free to try the case then.

The reason it wasn't followed through was that Mr. Goldberg was unable to guarantee that he could try the case in January. It turned out that I spoke to Judge Knapp, before whom Mr. Goldberg was then appearing, and I think this appears in the record also, and one of the defendants in Judge Knapp's trial had suffered a heart attack, and it

looked as though that trial would go on into February, so the case never could have been tried in January, and that is why the adjournment wasn't granted.

On the top of page 7, Mr. Martin says, referring to the substitution of Mr. Panzer, and I quote, "Actually, the defendant and his family did not know and had not even heard of Mr. Panzer. The Court then appointed Mr. Panzer to represent the defendant, Mr. McCloskey, and indicated he would represent the defendant without any cost to charge the defendant or to his family even though the defendant already expended $20,000 in legal fees and was in a position to hire paid counsel of his own choosing."

I, of course, had no idea of what moneys had been paid by the defendant Vincent McCloskey's family toward legal fees. It never was brought to the attention of the Court. What actually did happen was that on November 20th, and the transcript shows this, Mr. Goldberg said that the McCloskey family did not have funds to pay for an attorney.

On November 27th, Mr. Panzer was instructed to file an affidavit of indigency because Mr. Goldberg had informed the Court in chambers that Mr. McCloskey's family didn't have any money to hire new counsel.

Mr. McCloskey said on the record that it was all right with him to appoint this counsel, Mr. Panzer. That is

at page 35 of the record, Mr. Martin.

The substitution, however, was put off because Mr. Goldberg informed the Court of the discussions between his client and the United States Attorney regarding a plea.

On page 9, there is reference to the motions made by Mr. Martin which he says were returnable on December 10th, and which I advanced to Saturday morning, December 8th.

The reason I advanced the hearing on the motions was that the trial was scheduled to go forward on Decmeber 10th, and I thought Mr. Martin should know of my decisions on his motions before that trial started, and that was the reason the argument took place on December 8th.

Mr. Martin indicates that his staff work was interfered with, and I don't know whether he is indicating that he was a single practitioner in this case or not, but the record is perfectly clear that he had co-counsel by the mame of Mr. Cary who appeared in this court and appeared in my chambers with him at the time of the argument on the motions, and Mr. Martin indicated to the Court on December 8th that another attorney was working all the time in the library, so I gather there were two other attorneys aiding Mr. Martin in this trial.

I think that a reading of the motions that were made and argued on December 8th would indicate that there was

really a great deal of material in those motions that was really unnecessary, motions having been previously made by Mr. Goldberg.

On page 10, Mr. Martin says, "The Court told counsel during the course of the trial that it would not permit wide cross examination by each counsel, but expected there would be very little overlapping by counsel, and that if one attorney covered one portion of the case, then it expected the other attorneys would not cover the same portions of the case."

Now, it is true that I told counsel that I would not allow duplicative cross examination, and that they should agree among themselves who would carry the burden. The record is perfectly clear that counsel did confer as to who would carry the burden, because in many instances Mr. Direnzo, who under the rules would be the first one to cross examine, deferred to you, Mr. Martin, to carry the laboring oar on the original cross examination; so at no time were you limited in your cross examination.

It is possible that Mr. Direnzo or Mr. Hopper would be limited if they tried to ask the same questions, but you were completely free, because you carried the laboring oar on many of the defendants; so the ruling the Court made about not permitting overlapping of cross examination never applied to you or to your defendant.

The rest of the 19 pages I don't think need any comment because I think the record is perfectly clear. I do find something, however, on page 18 in which Mr. Martin says, "One of the defendants, John Turner, was a Government agent cooperating with the Government prior to the arrest of the defendants, and who cooperated with the Government throughout the proceedings. He was represented by counsel and his counsel was consulting with co-counsel for the other defendants, prejudicing their position with the possibility of information being leaked back to the Government."

Mr. Martin, I assume you are referring to Mr. Kaplan, who was the attorney for Mr. Turner. What counsel did Mr. Kaplan confer with, you?

MR. MARTIN: I wasn't in the case at the time.

THE COURT: Who do you refer to when you make the statement?

MR. ARTIN: Well, Mr. Turner appeared with all of the other defendants in September, as I read the record.

THE COURT: For a hearing, that is all, for his pleading, but your statement is that Mr. Kaplan conferred with other counsel, and I want to know the substantiation for that statement.

MR.MARTIN: Well, Mr. Hafetz, I believe, made a motion, and somewhere in the record in the papers Mr. Hafetz brought

that out, and this is what I was using because Mr. Hafetz was present at the period of time in September

THE COURT: He was here, yes, at the time of pleading.

MR. MARTIN: Right.

THE COURT: That is all, but there was no conferring with Mr. Kaplan and co-counsel regarding the defense in this case, to my knowledge; unless you are more specific, I can't accept this, number one.

And number two, you say prejudicing their position with the possibility that. Possibility isn't sufficient.

MR. MARTIN: Mr. Hafetz raised the point some time back in the record. I wasn't representing --

THE COURT: You have had a month to find out what it was about. I gather that is all you relied on. I can't substantiate your position.

MR. KENNEY: Your Honor, with regard to that point, the Government woudl like to make the representation that we received no information either from Mr. Turner or from Mr. Kaplan as to what any of the other defendants or their counsel would or would not do in connection with the case. We spoke to Mr. Kaplan and Mr. Turner only about his own situation, the facts of the case, and what testimony he would give.

THE COURT: On page 19, Mr. Martin says, and I quote,

"The Court erred in having read back to the jury during its deliberations the direct testimony of two of the witnesses and then certain selected extracts from the cross examination of the two witnesses and the redirect examination of the same witnesses."

This would indicate that all of the direct examination was read to the jury and only certain portions of the cross examination. That is not true, Mr. Martin. What we did was read to the jury what they requested in their note for information, and the portions that were read were picked out by you, Mr. Direnzo, Mr. Haifetz, and Mr. Hopper; and the record will so show, that I asked each one of you what portions did you want read.

To the extent that I overruled the portion you wanted read, that is in the record, but the portions that were read were agreed to by all counsel.

MR. MARTIN: If your Honor please, I made many requests and this was done rather rapidly in your Honor's chambers.

THE COURT: That was done for over an hour and a quarter, Mr. Martin. That wasn't rapidly. I sat there and went over page after page. Each one of you had daily copy in front of you. Each one of you told me, and the record will show the pages that you wanted me to read and they were granted or denied on the record.

MR. MARTIN: In this affidavit, I am referring to the overall record, if your Honor pleases, and what shows actually in the record on cross examination.

THE COURT: You are referring to the top of page 19 in reading back to the jury the direct testimony of two of the witnesses. We didn't read it all back. Portions of it were read back, and the portions that were read back were the portions they had requested. I didn't select them. The Government didn't select them. The jury asked for them, and the portions that were selected were picked out after consultation with defense counsel, and the record will show that I asked you specifically, as I did Mr. Direnzo, "What do you want me to read?"

MR. MARTIN: And there were many items that you didn't permit in.

THE COURT: Obviously, but that is on the record.

MR. MARTIN: Of course, I am referring to the overall record. That is what I am referring to here in my affidavit.

THE COURT: But you are giving the impression here that everything on direct was read and only certain selected extracts of cross examination were read. I am saying it's a wrong impression. Certain portions of the direct were read and certain portions of the cross were read.

MR. MARTIN: My position or the point I am making in

here is that those portions of the cross that were read did not fully cover the portions of the direct that were read, and I am standing on the record as the record itself reads.

THE COURT: If that is what you mean, the record so reflects.

MR. MARTIN: Right.

THE COURT: All right. Having reviewed the affidavit, the motion is denied.

MR. ARTIN: Respectfully except.

THE COURT: Mr. William McCloskey has submitted a pro se motion, as I have indicated. It tracks in essence the motion made by Mr. Martin on behalf of defendant Vincent McCloskey. He makes one point to which I should make reference.

Point One states,"The defendant was not properly represented by legal counsel and was deprived of a constitutional, statutory right thereto because the counsel representing defendant had previously represented another defendant in this action, and was in fact co-counsel for such other defendant at the time he was named attorney for the defendant William McCloskey herein."

I have already adverted to part of this point in ruling on the motion by the defendant Vincent McCloskey. The record shows that Mr. Goldberg was substituted in place and

stead of Mr. Hopper. Mr. Hopper was not co-counsel for Vincent McCloskey.

Secondly, while Mr. McCloskey in his papers carefully speaks about the other defendant, he doesn't point out that the other defendant was his brother, Vincent McCloskey; and from the papers submitted by Mr. Martin it appears that Mr. Hopper received $5,000 to represent Mr. Vincent McCloskey.

It is perfectly possible that the representation was arranged for him, Mr. William McCloskey, because of the payment of that $5,000 to Mr. Hopper.

But more importantly, Mr. William McCloskey voluntarily made this choice himself. The Court had nothing to do with it. And Mr. William McCloskey knew what the facts were and with his eyes wide open hired him.

The motion is denied.

MR. MASCARO: Your Honor, may I make one statement in reference to that, your Honor?

THE COURT: Yes.

MR. MASCARO: Since I am aware of the pro se application by the defendant William McCloskey, I would just like the record to state on behalf of William McCloskey with respect to the general tenor of your statement with respect to the history, chronology,and the events relating to this counsel situation, I would like the Court to bear in mind one other factor.

There is no doubt there was a heavy amount of money paid to an attorney insofar as the McCloskey family is concerned, and it is my feeling that in my two conversations with Mr. McCloskey down at West Street, that he had expected, which was never borne out in trial, or at the conferences between counsel and the Court, this one thing that he expected, and probably his brother, since, let's face it, it's a family, they expected, like in an automobile, they expected some running to be done; they expected some mileage to be obtained.

There is this fact that something stopped in the way of investigation. Ordinarily, I presume an attorney would like to go out and dig up witnesses, find facts, look at the scene, and I find that that is missing insofar as this record is concerned, and in my conversations with Mr. McCloskey --

THE COURT: I can only go on the record.

MR. MASCARO: I understand that, your Honor, but --

THE COURT: If you want to make affidavits and bring Mr. Hopper in here and put him under oath, that is your problem, but that has nothing to do with this motion.

MR. MASCARO: But when he says something, he may say "I understand," but he doesn't understand, and I think the Court could have considered that part.

THE COURT: You mean to say Mr. William McCloskey, your

present client, did not know that Mr. Hopper had been employed by his brother, Vincent McCloskey in this case?

MR. MASCARO: Regardless of that factor --

THE COURT: That is all I am commenting on. Point No. 1 in his motion is that error was committed -- this is his motion to set the verdict aside -- because error was committed and his constitutional rights were invaded because he was represented bya lawyer who was acting as co-counsel for his brother.

That is all I am commenting on, and the record shows that is not so, that he knew about it, number one.

And number two, the lawyer was no longer co-counsel for his brother. That is what the record shows.

Mr. Kenney, do you have anything to say before the Court imposes sentence on the defendants?

MR. KENNEY: Your Honor, the Government has nothing to add to the pre-sentence reports which are before the Court.

THE COURT: Mr.Martin, do you have anything to say before the Court imposes sentence on the defendants?

MR. MARTIN: ON behalf of the defendant Vincent McCloskey, your Honor. I don't believe I am representing Mr. Carroll at this stage. I spoke to Mr. Carroll about it.

THE COURT: We will get to the defendants in a minute.

I am asking you as counsel for Mr. Vincent McCloskey.

MR. MARTIN: Yes, yes, I do.

THE COURT: Go ahead.

MR. MARTIN: If your Honor pleases, the entire case, your Honor has been living with it a lot longer than I have been; it involved many defendants, and recently your Honor had occasion to sentence several of the defendants who testified on the trial of this action.

My defendant, Vincent McCloskey, has always taken the position that he was innocent. He proceeded to trial on that theory and undertook to partake of the rights to which he was entitled; that is, a right to a trial by a jury of his peers. He did that in this court.

During the course of the trial, and before proceeding with that, I would like to point out to the Court that the indictment itself, as I have indicated in the motion papers, charged three counts. It charged murder one, it charged assault one, but perniciously, in that indictment was a count of conspiracy which permitted the Government to lump in perhaps five to ten other crimes that had no bearing whatsoever on Counts 2 and 3, which are major crimes; in fact, Count 2 being a capital offense.

In the course of proving this case, the Government used primarily as its witnesses actual co-defendants and

co-conspirators; and the Government even went to the extreme of taking the two men who had guns, one of whom deliberately, as the jury subsequently found, put the gun to a postal employee's head and shot that trigger, pulled that trigger and killed that man; and in the process also with that same bullet managed to shoot the driver of the mail truck.

The Government recommended or told the Court that this witness had cooperated; and the Court in its sentence, from what I understand, sentenced that defendant to 25 years.

Another co-defendant who testified for the Government, Mr. Mann, got on the stand and admitted that he himself took a loaded pistol and downtown in the financial district blindly fired four shots after the driver of the truck. The Court then sentenced that defendant and that witness to 25 years.

Another witness, another defendant, John Turner, who testified for the Government, took the stand, admitted that he was there, he participated in the action as a principal, he carried a gun, and was to drive the mail truck.

This man, who then admitted thorwing the gun away, was sentenced by the Court to ten years.

It would seem strange to me that the law can ask the Court or even direct the Court to sentence defendants who have constantly alleged their innocence, and who then

went to trial, to be sentenced to sentences so disproportionate to that given by the Government and by the Court to other defendants who were not only equally culpable with the defendants, if the jury's verdict as has been found renders them guilty, but who were actually in effect witnesses, and in all logic and common sense, were the actual shooters and the actual killers.

Not only that, they were convicted felons. Before this incident, and during the course of the trial, the Government went on to give these people immunity from a series of events that happened over a period of a week or two in New Jersey, absolutely excusing them from numerous crimes during this period of time.

It is inconceivable to me how justice and law, equity and logic can countenance the sentencing of these three culprits to the sentences they got and then impose upon these defendants, who have maintained their innocence and who are still maintaining their innocence and will hope to prove it during the course of an appeal and subsequent trial if they are successful, can then turn around and give these defendants sho heavy a sentence as the Court is burdened to do.

I realize and understand that under the law the Court is limited in its sentencing power, but I think common

justice, any kind of equity, would dictate that the defendants be given all possible leniency in view of the fact that its light, wrist-slapping, unbelievable treatment accorded by the Government to these unregenerate felons, self-admitted murderers, and assassins,who testified on the stand. Thank you.

THE COURT: As you indicated, Mr. Martin, the Court has no choice under the law. I have no choice.

Mr. Mascaro, do you have anything to say before the Court imposes sentence?

MR. MASCARO: Yes, your HOnor, on behalf of Mr. McCloskey. I presume you have before you the record of William McCloskey insofar as his service record is concerned, which is unblemished, and as a matter of fact --

THE COURT: I have nothing before me. Your client has refused to be interrogated by the Probation office.

MR. MASCARO: I am sorry, I wasn't aware of that. Mr. William McCloskey is a veteran. He has been in service in the Armed Forces in Vietnam. He suffered a wound from which he recovered, and he was discharged honorably as a sergeant. He had received an Air Medal and a Purple Heart.

He is married, has a wife, Barbar, and two small children, Barbara Ann, a daughter age three, and another

daughter age 2, Kim Marie.

At the time he volunteered his body to be turned in here to the United States District Court, he was working with his mother in Florida operating a snack bar.

At this time, your Honor, I am more inclined to feel like saying a prayer for the young man rather than to speak at this time before this Court, when I know that the sentencing is practically mandatory, but in all of this trial, your Honor, I just can't help feel sorry for this young man. I am positive that you must have some thoughts towards that end.

I would like to make one request, your Honor, that if it's at all possible there will be an appeal filed, and of course there is not one on file now, but during the time that if proper appeal papers are filed, may the defendant be held at the West Street Retention area during the pendency of the appeal?

THE COURT: I will permit that provided there is an expedited appeal.

MR. MASCARO: Yes, of course, and so that it would be easy -- and it would not be expensive, in other words, to communicate with the defendant.

THE COURT: I will grant that application, As I say, there will have to be an expedited appeal as a condition

for granting the application.

MR. MASCARO: Yes, thank you, that is all I have to say.

MR. MARTIN: May I join in that also, your Honor?

THE COURT: It is granted. It will be granted for all three defendants.

Mr. Carroll, do you have anything to say before the Court imposes sentence?

DEFENDANT CARROLL: Yes, your Honor. I would like to begin, I would like to offer this -- these additional motions in evidence.

THE COURT: I will take them. I should indicate for the record that Mr. Direnzo's motion on your behalf in which he joins in the 19-page affidavit by Mr. Martin was denied. I think Mr. Martin has covered every possible ground that could be conveyed.

DEFENDANT CARROLL: Your Honor, again I would like to state that I feel I haven't been given due process, and I have asked the Court in the beginning to appear as co-counsel, which I was denied by the Court. I was given the choice of either firing my lawyer or sitting down.

Again I ask the Court to hear the motion which was denied. I ask to put off the sentencing as my attorney is ill. For the same reasons the motions were late getting here.

THE COURT: No, no, that motion was denied because Mr Direnzo consented to the sentencing to proceed today in his absence.

DEFENDANT CARROLL: Your Honor, I haven't seen Mr. Direnzo since his illness, and there was no way, from the way things are set up, that I could possibly get these things here until this morning, and there are things in here I felt that should have been heard in regards to perjury from two of the witnesses that the Government put on; and I wanted to bring out, if I may, just go over them two points.

THE COURT: You don't have to, but I will read them after.

DEFENDANT CARROLL: All right, your Honor.

THE COURT: The imposition of sentence does not prevent theCourt from reviewing the motions.

DEFENDANT CARROLL: And I feel that the Court was pro-Government all the way, and I feel that the Court was pro-Government throughout the trial, and we didn't get any latitude at all as far as witnesses or anything. I made a complaint about Mr. Kenney subpoenaing my witnesses, about the Government tampering with the witnesses and bothering them; and at that time Mr. Kenney got up and stated that he was calling the witnesses for me so I would have some

witnesses. However, I didn't see any witnesses. I wanted to testify and take the stand, but I was again handicapped because your Honor told the counsels that they would have to decide together what they were going to do.

THE COURT: I never said that.

DEFENDANT CARROLL: I believe -- if I am wrong I stand corrected -- that you told the counsels that you wanted them to ask not to go over any questions, to get together, and what went for one went for all.

THE COURT: No, no.

DEFENDANT CARROLL: Something to that effect.

THE COURT: I never told any counsel that they had to agree together as to whether any defendant would take the stand. I never said that.

DEFENDANT CARROLL: Your Honor, I wanted to bring witnesses in; I wanted to put the witnesses on.

THE COURT: You had Mr. Direnzo, a completely competent attorney.

DEFENDANT CARROLL: That is what I wanted to do, and I was told I couldn't do it for the simple reason that they all had to agree on what --

THE COURT: I never said that. What you and your counsel agreed on and Mr. Martin agreed on and Mr. Hopper agreed on is something I know nothing about, but nobody was

directed that you had to work as a team as far as the defense was concerned.

DEFENDANT CARROLL: All I know is that this was -- I wanted to bring witnesses in. Mr. Kenney said he had witnesses which he never produced for me and although he did put Mr. Wall on, and he ceased there when I guess it didn't work out the way he wanted; and I wanted to take the stand, because I could have contradicted everything that these people say.

For instance, Mr. Crawford said that I met him, that he was waiting for me to bring his car back in January downtown in Maiden Lane with Mr. Boyd.

What he forgot to tell the Court was that I was in court at the time before a judge for the purpose of stealing his car, and that is what I was on trial for.

And also I'd like to point out that Mr. Turner turned around and said that he met me on four times, and on four days, and each day he said and each time he said, I was in court before a judge; and when Mr. Direnzo tried to bring it out, you, your Honor, you stopped him, and you told him,

"Go on, you went to that question, you asked it. Don't ask it no more. Go on to the next question;" and you stopped him from asking it.

And he could have proved that the man was wrong

because Mr. Direnzo was in court with me on most of these occasions. He handled the case, and I don't think there could be any better proof that the man is a liar than the fact I was in front of another judge at the time.

And that is why I felt these motions should have been here because there is a lot of stuff in here, you know, pertains to that, and I feel that the Government had nothing but perjury up there as far as their witnesses.

Almost all the times that these people claim I was with them I was either in court or in jail or something. I got arrested in January, which I was acquitted of, and I got arrested in February and I didn't -- there is a time period there where the U.S. Attorney claims that I was here and I was there that I had to be in nine different places; and they just came down with two more indictments for the same times, and the same places.

Now they got me in like three different states on the same day. I must have had wings or something; I don't know. But it's a lot of lies in there, and that is what I wanted to bring out.

THE COURT: Mr. Carroll, the probation report indicates that you refused to confer with the probation officer. Is that correct?

DEFENDANT CARROLL: Yes, your Honor, I made a comment

to the gentleman that I was innocent, and I felt that I got railroaded, and I also stated that I thought you was the engineer,to go see you for a report.

THE COURT: Mr. Vincent McCloskey, do you have anything to say before the Court imposes sentence upon you?

(Defendant Vincent McCloskey shook his head negatively.)

THE COURT: Is it true, Mr. McCloskey, that you also refused to confer with the probation officer when he asked you to get information from you upon which to prepare a probation report?

DEFENDANT VINCENT MC CLOSKEY: Yes.

THE COURT: Mr. William McCloskey, do you have anything to say before the Court imposes sentence upon you?

DEFENDANT WILLIAM MC CLOSKEY: Yes, your Honor, I do. I would just plead that you would go through the minutes of this case, and as you would, if you would get down to my particular involvement in this, supposed involvement in this, you will see that none of the defendants mentioned me or knew me before they spoke to Mr. Kenney. That is all I want -- I'd like to say.

THE COURT: Mr. McCloskey, is it true that you also refused to be interviewed by the probation officer when he sought to speak to you in connection with the preparing

of a probation report?

DEFENDANT WILLIAM MC CLOSKEY: Yes, I did.

MR. KENNEY: Your Honor, before your Honor pronounces sentence, with regard to Mr. Carroll's statement that the Government interefered with his witnesses, I'd like to make a short statement.

I think the record reflects that immediately prior to the commencement of the trial on December 10, 1973, we called to the Court's attention and to Mr. Direnzo's attention that we had interviewed Michael Wall, Raymond Engels, and Sheila Cody, and that some of the statements that they made, both to the Government and before the Grand Jury, we felt might be helpful in a defense which Mr. Carroll might want to present.

For that reason, we had issued subpoenas for them at the beginning of the trial so that they would be available, and we asked Mr.Direnzo to let us know if he wanted to call any of these witnesses.

We called Mr. Wall, as the Court knows, ourselves, to establish the telephone in Wall's Tavern. Mr. Direnzo did not ask us to produce any of these witnesses, and so, although they were under subpoena, they never came to court.

THE COURT: All right. It is perfectly obvious I have no choice in the sentences that I have to impose in this case.

MRS. DORIS HUBERT: Your Honor, may I ask a question?

THE COURT: Yes.

MRS. HUBERT: Is it not Mr. Carroll's constitutional rights to be represented today?

THE COURT: He is represented by an attorney who made motions on his behalf, and he says that he is perfectly willing for the sentence to proceed, and the reason he is willing for the sentence to proceed is that there is no area in which he can be of any help to the defendant. The sentence that has to be imposed is fixed by law. I have no choice.

MRS. HUBERT: Thank you.

THE COURT: No choice at all.

MRS. HUBERT: Thank you.

THE COURT: If there was an area in which counsel could be helpful to Mr. Carroll, that would be something different.

MRS. HUBERT: I believe there are areas in which he could be helpful, and as he was his counsel, that he can --

THE COURT: In what areas do you talk about, the sentence? Absolutely none.

MRS. HUBERT: I am not in a position to speak, your Honor.

THE COURT: The law give me or forces upon me and enjoins upon me only one sentence, and I can't give any other.

MRS. HUBERT: Thank you.

THE COURT: I am sure you are aware of that by now.

As provided by law, under the conviction on Counts 2 and 6, under 1111 of Title 18, I am enjoined to impose a sentence on each defendant of life imprisonment.

On their conviction on Count 3 I am enjoined by law under Section 2114 to impose a sentence of 25 years.

The sentence to be imposed on the conviction on the conspiracy count under Section 3371 of Title 18, I will impose a sentence of five years.

These sentences obviously are to run concurrently.

I direct that Mr. Martin and Mr. Mascaro file a notice of appeal on behalf of their respective clients forthwith, and I direct the clerk of the court, Mr. Frezzo, to file a notice of appeal on behalf of defendant Carroll.

MR. MARTIN: Your Honor, on behalf of defendant Vincent McCloskey, may we have the clerk of the court file the notice of appeal?

THE COURT: No, you are retained,privately retained counsel. You are directed to file.

MR. MARTIN: I understand, but under the statute the defendant has specifically requested that I ask the Court, in accordance with his rights, to have the clerk file the notice of appeal.

THE COURT: I can do it either way. Don't you want to do it, Mr. Martin?

MR. MARTIN: I am certainly going to cooperate. I already have the papers.

THE COURT: What do you mean you are going to cooperate?

MR. MARTIN: The clerk has given me the papers to fill out. We are in the process of doing this now.

THE COURT: So you are filling them out?

MR. MARTIN: Of course.

THE COURT: You file it.

MR. MARTIN: The defendant has requested that I have the clerk file the notice of appeal in accordance with the Federal Rules of Procedure. I instructed him what the rights are.

THE COURT: It can be done either way.

MR. MARTIN: I understand that, but I am telling your Honor that the defendant has requested the the clerk -- that the court --

THE COURT: You fill it out and give it to Mr. Frezzo, and he will file it for you.

MR. MARTIN: Thank you.

DEFENDANT CARROLL: Your Honor, may I say something, with the Court's permission? I am starting trial in

New Jersey on the 11th. I have two other indictments, I believe, were handed down since -- while this trial was going on, and with the appeal, I would appreciate it if the Court can leave me in West Street till these --

THE COURT: I have granted that application for all three defendants.

DEFENDANT CARROLL: Thank you, your Honor.

THE COURT: Defendants are remanded.

Mr. Martin, the clerk says the papers you have in your hand have nothing to do with an appeal. I have been talking about filing a notice of appeal. You got up and said you have in your hand a notice of appeal.

MR. MARTIN: I said I have some papers that the clerk handed me that were in the process of being filled out, which I have --

THE COURT: But you gave me the impression that you were talking about the notice of appeal. The clerk tells me now you don't have such papers.

MR. MARTIN: Your Honor, all I am telling you is that the clerk handed me some papers that I am in the process of filling out.

THE COURT: You don't know what they are?

MR. MARTIN: At the Court's request. Yes, there is a request concerning the transcript of the minutes, and

information to be submitted to the court reporters, and there are copies for the court reporter, for the clerk.

THE COURT: So that has nothing to do with the filing of the notice of appeal.

MR. MARTIN: It's not a form of filing a notice of appeal. It's papers that the clerk gave me to prepare and file with him before we left today.

THE COURT: File them all for all three defendants.

THE CLERK: Yes, sir.

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I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Official Court Reporter
U. S. District Court

U.S. DISTRICT COURT
FILED
FEB 1974
S.D. OF N.Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA :

vs. : 73 Cr 855

THOMAS J. CARROLL, JOHN TURNER, a/k/a "Jack," VINCENT McCLOSKEY, a/k/a "Mike", ROBERT E. RIPPY, a/k/a "Ripp", CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DENEY MEYERS and GEOFFREY MATTHEWS MANN, :

Defendants :

-and-

UNITED STATES OF AMERICA, :

vs. : 73 Cr 972

WILLIAM McCLOSKEY, a/k/a "Billy", and HARRY JOHNSON, :

Defendants. :

----------x

Before:

HON. CHARLES M. METZNER,

District Judge

New York, N. Y.
January 8, 1974 - 10:30

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APPEARANCES:

PAUL J. CURRAN, ESQ.
United States Attorney for the
Southern District of New York
BY: JOHN J. KENNEY, ESQ.,
Assistant United States Attorney

Appearances (Continued)

JACK KAPLAN, ESQ.,
Attorney for Defendant John Turner

JAY GOLD, ESQ.,
Attorney for Defendant Chester Crawford

JOSEPH KLEMPNER, ESQ.,
Attorney for Defendant Paul Crawford

MURRAY MOGEL, ESQ.,
Attorney for Defendant Terrence Dewey Meyers

ROBERT MITCHELL, ESQ.,
Attorney for Defendant Geoffrey Matthews Mann

MRS. FLORENCE P. SHIENTAG,
Attorney for Defendant Harry Johnson

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MR. GOLD: Your Honor, I am ready, but I understand Mr. Crawford is not here.

THE MARSHAL: He is on his way.

THE COURT: It was called for 10:00.

THE CLERK: Mr. Meyers, Mr. Mogel.

MR. MOGEL: Meyers ready.

THE CLERK: For Mr. Mann, Mr. Mitchell.

MR. MITCHELL: Ready.

THE CLERK: Bring the defendants out, please.

THE COURT: Who is the one that is missing?

MR. KENNEY: Chester Crawford.

THE CLERK: Mr. Chester Crawford.

THE COURT: Mr. Kenney, these are cases in which these defendants pled guilty, as I recall. And are they also the cases in which you made a request that the Court take into consideration whatever information the Court has gleaned from the file of the case?

MR. KENNEY: That's correct, your Honor. That is true in the circumstance of each of the defendants who is before you except for Harry Johnson who the government didn't call as a witness at the trial.

However, he offered his cooperation and it is the government's choice not to call him.

With regard to the defendant -- I will leave Chester

Crawford out since he is not here at this moment -- with regard to Meyers and Mann, the government, as your Honor knows, had a written agreement which was entered into evidence as Exhibits D and J at the trial. And we called to the Court's attention, we handed up these exhibits and called the Court's attention to the second and third paragraphs which I will read if I may, or I will hand them up.

THE COURT: My question, however, was directed to the proposition as to whether an acception of a plea of guilty to murder in the second degree included the crime of assault and conspiracy for the various defendants that a statement was made on the record that the Court was to take into consideration the facts and circumstances of the crime as it learned of them during the trial.

MR. KENNEY: I don't know that that statement was made on the record with regard to any defendant except for John Turner, your Honor.

We submit and urge that you take into consideration all the facts as the Court has heard them.

THE COURT: All right. Do you have anything to say, Mr. Kenney, before the Court imposes sentence in this case?

MR. KENNEY: Inaddition to what I have already said, your Honor, I just call to the Court's attention that

while we don't minimize the crime that has been commited here, probably the most serious crime that could be commited, the case could not have been tried without the assistance of the participants, that is, the case against Tommy Carroll, Mike McCloskey and Billy McCloskey, also Mr. Rippy, who was acquitted.

The only other thing we would like to call to the Court's attention is we would ask the Court not to consider in imposing sentence those facts which the Court heard concerning the robbery of Rocco DiGeorgio outside the Plaza National Bank. We think considering those facts may be a violation of the immunity which was granted at the trial.

THE COURT: That's correct. All right, Mr. Mitchell, have you anything to say before the Court imposes sentence on Mr. Mann?

MR. MITCHELL: Your Honor has a full probation report. Your Honor has heard the defendant, although I was not present during his testimony over an extended period of time so that you have a conception of the part the defendant played in the entire thing. I might state, as Mr. Kenney has, that were it not for the fact that Mann upon being questioned by the postal inspectors at the very inception of the investigation cooperated immediately, I don't think that

the government would have gone further than Meyers and Mann in the entire picture. Although they may have had suspicions, I don't think they had any evidence.

And I feel that it was as a result of that cooperation that the people who actually induced Meyers, induced Mann to come into the picture were ultimately convicted.

I realize the nature of the crime is one that requires punishment of an extreme nature. At the same time we have a 26-year old defendant who, although he has a previous record, I believe the probation report might reflect that it was not one of violence as in this case and I want to say this: the defendant would like to explain to your Honor something about the shooting of the gun which he had in his possession. He believes he could portray it a little bit better than I could and I would ask your Honor to listen to him on that aspect.

THE COURT: Mr. Mann?

DEFENDANT MANN: Yes, I would like to speak there is no intention of shooting him on my part. It was a pure act of panic.

THE COURT: That is true, you weren't charged with premeditation. You were charged with murder in the first degree resulting in the commission of a felony, separate and distinct crime from premeditation and as I charged the jury

the accidental going off of the gun was not justification for the murder. I have to charge them that in conjunction with the four defendants for trial.

Mr. Mogel, do you have anything to say before the Court imposes sentence on Mr. Meyers?

MR. MITCHELL: Your Honor, there is just one request the defendant asks. The defendant asks whether in imposing the sentence you will consider the possibility of an A2 sentence, that is, an eligibility for parole when the Parole Board determines rather than the norm.

THE COURT: Not in this crime.

Mr. Mogel?

MR. MOGEL: Your Honor, Mr. Meyers when arrested with Mr. Mann in June made a comprehensive statement of the facts of the crime. The information he gave led to the arrest of other people in the period from June until trial and Mr. Meyers cooperated with the government, had many interviews with Mr. Kenney. He testified at the trial for several days; in my view his testimony was essential. He was a rather thorough witness and I think that his testimony certainly led to the conviction of other defendants for the crime of murder in the first degree.

There is in this case from Mr. Meyers' point of view a very crucial fact which I think should be somewhat

determinative of his sentence. He had no intention to [illegible] Mr. William Mickey. From the very first interview I had with Mr. Meyers and throughout the preparation of the case Mr. Meyers has always insisted that he was told that this was an inside job, that he was led to believe that the guard in the mail van was participating in the crime, that there would be no resistance.

Mr. Meyers climbed onto the truck with a gun. He had the gun in his left hand. He is left-handed. He discovered that the door was locked. He switched the gun to his right hand; put the gun into the cab and simultaneously attempted to open the door. That moment the gun was either pulled or knocked by the guard and discharged and killed the guard.

Mr. Meyers has admitted to me that he has a criminal record. He admitted on the stand that he has engaged in unlawful conduct, but put in Mr. Meyers' words to me "taking a man's life is past my limit" it is something that he didn't intend to do. He is not a murderer, a professional murderer. He was led into a situation with certain expectations and he asks the Court to consider that this shooting was accidental. Other factors in this case are that Mr. Meyers faces an additional sentence in Washington, D.C. There is an open case --

THE COURT: That is unrelated to this case.

MR. MOGEL: It is unrelated, your Honor, but it perhaps accumulates the time.

He also asks that your Honor make a recommendation that he be sent to the penitentiary Lewisburg which is near his home.

THE COURT: You know, Mr. Mogel, I have no control over that.

MR. MOGEL: Your Honor, sometimes a recommendation is persuasive.

THE COURT: I have always been told not to make a recommendation because he doesn't listen to it. They have in the Bureau of Prisons claimed that they know what is best for the operation of their system. But I will make the recommendation.

MR. MOGEL: Thank you, your Honor.

Mr. Meyers would like to address the Court.

THE COURT: Yes, Mr. Meyers.

DEFENDANT MEYERS: First of all, your Honor, I would like to say that I would like to emphasize the fact that I had no intention whatsoever in any shape or form or fashion to take Mr. Hickey's life. As I said before, I say again, I just want to say it personally to the Judge it was definitely an accident. I know it doesn't mean much legally

but it means something to me more. This is why I did what I could as far as the government is concerned to try and show the attitude that I had about it, the attitude about the position I was put in and the way I thought I was used.

The only thing I can say about my sentencing is that I know I have time to do and I don't mind doing it. The only thing I would like to say to the Court that I would like to take the attitude I have about what happened to court and try and construct myself some type of future vocationally, academically for me and my family and I hope that the Judge will take this into consideration when he sentences me.

THE COURT: Mr. Klemmer?

MR. KLEMMER: Yes. If your Honor please, I was present at that portion of the trial at which Paul Crawdord testified. I think your Honor found that his testimony was entirely credible and entirely true. If in fact it was less essential than the testimony given by some of the other co-defendants who had pleaded guilty I think the reason for that is that Mr. Crawford's participation in this whole thing was less essential and was in fact very minor. The facts were that Paul Crawford came up on the invitation of his brother as conveyed through the defendant Rippy, he came up to New York, he did go over the route some months before the actual incident culminated in the crime that we are here

for today and according to Paul Crawford's word which I don't think has really ever been challenged in the course of the trial, although I might be wrong, seeing what the crime was and seeing what the extent of it was Paul Crawford asked out. He left, he never came back, he was not present when the actual robbery took place. Paul Crawford worked for Sears Roebuck as a tire changer. He has a limited education, perhaps a limited intelligence. He does know that he did something incredibly stupid. He has spent the last months incarcerated, being able to review that in his mind.

He has pleaded guilty in this case to conspiracy, a plea that was allowed him because of the very minor nature of his participation. He is aware of what happened eventually in this crime. He is aware of the scope that your Honor has as a possible sentence over him.

But I suggest to the Court that if there is any other defendant in this case whose participation parallels Paul Crawford's it is not anyone else in this room, it is perhaps the defendant Rippy, who as your Honor knows was acquitted by the jury. Paul Crawford was guilty of something. He pleaded guilty, he stands ready for a sentence, but according to his participation in this crime and his past record I think he should be dealt with in a very individual way. That is all I have to say. I know

Mr. Crawford would like to address your Honor.

THE COURT: Yes, Mr. Crawford.

DEFENDANT PAUL CRAWFORD: Well, two mistakes I made, one was coming to Washington and the other was stupid enough to go over the route and once I went over the route and found out what was about to take place I wanted no part of it so I abandoned the plan then and I did spend the rest of the week here because of the fact that I didn't have the money to go back to Washington and on Saturday when I went back to Washington I didn't return, I didn't see any of the defendants until on June 8th when I was arrested and I didn't know that the crime had been commited which the postal inspectors told me they don't see how, it was on the newspapers and radio and everything else, but I don't know anything about the crime has been commited. And -- so when I was approached by the postal inspectors and they was questioning me at first I didn't say anything, because I didn't want anything to do with it, and they told me that there was a murder commited in it. So I told them what I knew.

I told them I went over the route twice and I told him that after I went over that I didn't want anything to do with it. And he questioned me to find out why did I go twice. I told them because I didn't have any money, didn't have anyplace to stay. But I had no intentions of going

through with it after the first time. I wanted to abandon the plan, because on my past record there is nothing violent about it, I have no intentions of putting a gun in my hand or do nothing like that, because I don't think I would be hell of a sentence whatever it may be, so I wouldn't do a crime that serious.

THE COURT: Mr. Gold, I understand Mr. Chester Crawford is here now.

MR. GOLD: Yes, your Honor, may I just have a very brief word with Mr. Kenney?

THE COURT: Yes.

MR. MITCHELL: Your Honor, while we are waiting the defendant Mann also lives in the District of Columbia and he would ask for whatever it is worth that you recommend to the authorities that he go to Lewisburg.

MR. GOLD: May we approach the bench, your Honor?

THE COURT: Yes.

(At the bench.)

MR. KENNEY: If I may, your Honor, Mr. Gold has just called my attention that Chester Crawford's understanding was that he would not be sentenced until he completes other cooperation which he has been giving to the government. That was different than my understanding. I know he is giving cooperation in other cases but I was under the

impression the F.B.I. Agent you heard on the trial, Allan Garber would be here to make a statement on his behalf.

Apparently he is not. We would have no objection in adjourning Chester Crawford's sentence until this could be straightened out, whatever would be convenient to the Court.

THE COURT: I will adjourn it then pending advise from counsel that the case is ready for sentence. All right?

MR. GOLD: That is satisfactory, your Honor, thank you very much.

MR. KENNEY: I point out to the Court this man is serving a ten-year sentence now so there is no bail problem of any nature.

THE COURT: Does he get credit for the time he is serving now against the sentence that is going to be imposed on him?

MR. GOLD: I don't believe so.

MR. KENNEY: No, not as a matter of law, no.

MR. GOLD: But this is his wish.

THE COURT: All right.

(In open court.)

THE COURT: The sentence of Chester Crawford is adjourned to a date mutually agreeable to counsel for the government and to the defendant. Chester Crawford can be

returned to the cell.

THE COURT: Mr. Kaplan?

MR. KAPLAN: Yes, your Honor. Mr. Turner, would you step forward please? I represent John Turner, the gentleman at my left. I have had a number of conversations with Mr. Turner in preparing his defense. So has Mr. Clark in my office who is in the back here. I also spoke to Mr. Turner's wife who is in the front row in the brown dress and sweater.

I believe Mr. Turner's position in this case is different from all of the other defendants and in many ways unique in my experience. Mr. Turner has not lived a life of crime in the past. This case represents his first conviction. There is a pending charge in New Jersey that is related to a gun that is not related to this and it is my understanding that he has an eminently respectable defense to that charge.

Mr. Turner bntil a couple of years ago lived a completely law-abiding life as a fully-employed individual. He worked in a bank. He left to better himself and worked for a trucking company, went back to the same bank. They were glad to have him back. And until a couple of years ago he worked as a truck driver and as a supervisor of truck drivers, which is a difficult job and a responsible job. It

requires training, it requires constant lie detector tests. It is a job in which the workers are constantly exposed to temptations of all sorts, temptations which Mr. Turner resisted.

He has a stable personality. His marriage is a solid one and a good one. His wife has worked for five, six, eight years for one hospital in New Jersey as a nurse's aid, what nowadays would be called a paraprofessional, I think. They don't have any children.

And he became involved in this case partly because he was doing such a good job of bettering his economic condition in life. He saved up enough while he was working as a trucking supervisor to buy himself a tractor trailer and go into business for himself. Then he bumped into the recession that we had a couple of years ago and he had to sell the truck and he was out of work. And it was at that moment in his life when he met FBI Agent De Bellis and became an informant for the Federal Bureau of Investigation.

He was able to act as an informant primarily because so many of the people that he knew and had grown up with and had worked with were crooks.

He came from a poor and tough part of a dirty city and the work he did was not gentlemanly work, but he stayed clean throughout.

His is not the typical instance of a man who is apprehended commiting the crime and who then agrees to cooperate with the government because he has no choice and he thinks that he can improve his situation.

I have asked Turner repeatedly about his motivations for becoming an informant -- I think that they would be important to your Honor to know -- and I am not sure I understand them now. Being an informant is a tough and a dangerous business. It is living out "The Spy Who Came in from the Cold". And although Turner was paid for his services he wasn't paid all that much. He could have done a lot better as a trucking supervisor, a job that he could get today if your Honor couuld see your way clear to putting him on probation.

He was a good informant and a honest informant and he is a truthful man. I didn't see him testify at trial -- my associate, Mr. Clark did -- but I read the transcript and it fits in with the picture that I have gotten of Turner. He is a truthful man, and I decided that what he really is is law enforcement-oriented.

Before he became an informant he happened on one occasion on a scene where some police officers were being assaulted and at considerable risk to himself he dove in, the good samaritan, and helped the police officers come out

of the scrape alive. For that I think he got some sort of civilian medal in New Jersey. I don't cite that as an instance of good conduct to be weighed against the very serious offense he commited and that brings him in today. I cite that as a kind of information of the kind of man he is and the kind of treatment he deserves. He is not a threat to society. He is a basically law-abiding man.

How did he come to be involved in this case? Well, I submit that part of it is that there is an occupational hazard in being an informant. Your association with criminals becomes constant and intense; your participation in crime gets the blessing of the government.

Turner basically is a truck driver. That was the role he was supposed to play in this case. He was supposed to drive the truck away. That is a role that he played in previous highjackings by these same people, or some of them, with the advance knowledge and the advance blessing of the FBI, the symbol of law enforcement; perhaps even more of a symbol of law enforcement in the community where Turner lives than the United States District Courts of the country.

This particular case came about because Agent De Bellis was interested in making a case against Carroll and the older McCloskey who were regarded as very serious malefactors.

Turner didn't know Carroll and McCloskey. Turner was obliged by the agent to meet them and to come into contact with them and to participate with them.

The experience of participating with Carroll and McCloskey led to Turner's being included in the plan for this highjacking of a post office truck. Turner didn't report this highjacking in advance. That was a breach of the rules under which he operated as an informant, but it was not such a very big step from his behavior previously as an informant.

I have often myself regretted the necessity that law enforcement has of relying on informants to prove crimes. In some cases it does substantial harm to the individual involved and it always leaves a fairly sour taste in everyone's mouth. It is much better to have a crime where there is physical evidence, neutral evidence, fingerprints or photographs or to have a crime where the eyewitnesses are good ones and can identify the participants.

Nevertheless, the use of informants is a necessity, but in this case Turner is a casualty of it. He was exposed to the situation.

He had his moral sensibilities and his sense dulled by the kind of activities he was encouraged and urged to engage in and when this particular planned highjacking came

along he fell victim to greed as well as these dulled moral sensibilities. He was led to believe that there were millions of dollars to be made and this was his chance to get out of the life he was living.

Even so he was ambivalent, ambivalent to the extent that he aroused Carroll's suspicion and became in the position of some peril because Carroll is a violent man and a dangerous man and a reckless man. In the olden days he would be called a desperado. He is the kind of guy that would rob stagecoaches and there is no way that a man who is invited into a conspiracy of this sort with men of this type can get out of it. Once he is in, he is in, because if he tries to get out there is the immediate suspicion that he is going to turn everybody in and so they have to do him in.

And I gather that although the kind of silence that we are talking about is sometimes scoffed at by people who think it only functions in detective stories, I have been informed in this case it was a very real fact of life and in my experience I am willing to believe that.

When the attempted highjacking resulted in the awful tragedy that did come about, Turner, ambivalent as I have said, basically law enforcement minded and truthful, as I have said, reported on the offense before anyone knew

that he was one of the ones involved.

In fact, at the time that the indictment came down he was named as John Doe, also known as "Jack", even though six weeks earlier he had, after the offense, but six weeks before the filing of the indictment, he had made a statement indicating his complicity in the offense.

He made that statement voluntarily and also undoubtedly because he thought that he might as well, since they would probably catch him anyway. But again I don't offer it as excusing anything that he did. He acted badly, there is no question about it. He contributed to the dangerousness of the enterprise -- there is no doubt about that -- although as the driver of the truck after it was stolen I submit that his role was a relatively minor one.

Nevertheless, I don't think that Mr. Turner needs to be locked up anymore. I don't think he is a danger. I don't think he needs to be punished anymore. And I do think he has it in his capacity, he and his wife, to live out useful lives as respectable citizens making an appropriate contribution to society.

THE COURT: Mr. Kenney, Mr. Kaplan has made some statements of fact which I would like you to answer.

MR. KENNEY: Your Honor, we have no knowledge of the statement made by Turner implicating himself in the crime

prior to the indictment in June. In fact, the earliest statement we know of where he implicated himself was on June 20, 1973, a statement that was marked for identification at the trial.

He did make statements to De Bellis, the FBI Agent for whom he operated as an informant, prior to that time implicating other people and indicating he had gotten the information from unknown sources in a hearsay manner.

I have no information and I have checked with De Bellis and other agents of the FBI of any highjacking of which Turner gave advance notice to the FBI. I have information only as to one highjacking in which he participated which he reported subsequent to the highjacking of the truck, but no advance notice.

Would the Court care to have me address myself to any other matter?

THE COURT: No, that is the one I was particularly interested in. Of course, the probation report doesn't indicate anything you say, Mr. Kaplan.

MR. KAPLAN: Well, I believe these are facts. I discussed them with Mr. Kenney at some length and I would think that Mr. Kenney would be in a position to either confirm or disaffirm. In fact, I asked him ahead of time.

THE COURT: He said he disaffirms.

MR. KENNEY: I disaffirm. If Mr. Kaplan wants to press the point we would agree to have Mr. Turner's sentence adjourned and recheck it.

THE COURT: He indicated to the probation officer everything he knows and nothing involved in his statement in the case involves statements of facts that you mentioned.

MR. KAPLAN: If De Bellis simply didn't mention it because no one asked him --

THE COURT: I don't think he was approached to state what Mr. Turner said to him as an informant. I don't think that would call for any withholding of information by Mr. De Bellis.

Mr. De Bellis called my chambers yesterday. I told him to submit a letter. He said there is no point, because everything he would submit in a letter had already been told to the probation office.

MR. KAPLAN: If your Honor please, if you think those aspects of Turner's history are sufficiently interesting to merit, I would specifically request Mr. Kenney direct those specific questions to Mr. De Bellis so that Turner isn't in the position of --

THE COURT: I gather Turner didn't tell the truth in this case until it was obvious he was in it which was

after the date of the crime or after the date of the indict-
ment.

MR. KENNEY: After John Doe was in it and after the government pressed its search as to who John Doe was.

MR. KAPLAN: That is all I intend to say to your Honor. At the time he said he was in it, at that time the government didn't know he was in it.

THE COURT: But they were going to find it the week or week after, that is perfectly obvious.

MR. KAPLAN: It may be --

THE COURT: That doesn't prove he came forward and nobody knew it. He turned himself forward when the trail was hot.

MR. KAPLAN: He gave the clues.

THE COURT: That doesn't make any difference.

MR. KAPLAN: I was addressing myself to his state of mind, if your Honor please.

THE COURT: I don't think Mr. Turner is as law-abiding and law enforcement-minded as you say he is. It is true he acted as an informant for the FBI in one or two matters, but it was like "two for you, one for me, this one I keep, you get the other two."

The record in this case shows they thought there was going to be three or four hundred thousand dollars in the

truck and he was to get one-sixth of it. You say he thought millions.

The government put in evidence six out of 22 bags which totaled over a million dollars, did they not, Mr. Kenney?

MR. KENNEY: Slightly over two million.

THE COURT: So you were up in the million dollars and he was keeping this one himself.

MR. KAPLAN: No question.

THE COURT: So his desire to be a law enforcement officer was out of the window when the green was pushed in front of his nose.

MR. KAPLAN: Of course, he was in no position to be a law officer because the most he could be was an informant. As an informant he was in the position where he was subject to a maximum of temptation and minimum of controls because he was so supposed to participate. The normal rules don't apply.

It is his job not to walk away and say, "I don't want anything to do with it." It is his job to say and listen and to participate.

Under those circumstances I respectfully submit to your Honor that it is very easy for a man to fall victim to temptation. And if your Honor should see fit to

allow Turner to return to society immediately, I would urge your Honor to emphasize the standing condition of probation that specifies --

THE COURT: Obviously I will not do that.

MR. KAPLAN: -- that men should not act as informants. I don't think Mr. Turner is fit to act as an informant anymore. He exhibited a capacity to fall victim to temptation and he should stay out of it. But as regards his capacity to live a law-abiding and useful life I stand by what I said.

THE COURT: All right.

Mr. Turner, do you have any statement to say to the Court before imposing sentence upon you?

DEFENDANT TURNER: No, your Honor, I do not.

THE COURT: That leaves Mrs. Shientag.

MRS. SHIENTAG: Your Honor, I represent Harry Johnson who I maintain is the least involved of all the defendants beforeyou for sentence. He was not indicted with the others, but was indicted in November in a three count indictment and his plea to the first count, the conspiracy count was accepted and the others dismissed.

He pleaded guilty at the first opportunity that he had early in December -- no, I am wrong about that. He pleaded guilty in November, the indictment was returned in

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October.

He comes from a very good family. His wife is in court, she is an assistant on the staff of Congressman Dellams of California. His father is in court. He is a long-time employee of the Civil Aeronautics Board. His father-in-law, his wife's father is in court. He is a retired army officer and he himself has had a college education. He has had four years in an art school and he is an industrial designer of great skill and I was deeply impressed with the work that he showed me.

I don't want to burden your Honor with the work, but I would ask the Court to receive as some evidence of his ability his personal card which I think indicates his talents. He's worked for many important agencies throughout the country. When he was first brought to me -- and I am assigned counsel -- I asked why he associated with Mr. Mann who brought him into this scheme. I said you knew that he had a criminal record and my client said yes, but where I come from, the black community, there is scarcelya family that isn't touched with some form of criminal record. He on the other hand had no criminal record at all. He served in the Army and he -- is well-liked in his community. He's never been involved in any crime. In fact, I have a letter from the mayor of his town -- I won't burden

your Honor with it unless you care to see it.

But he points out it is an honor and privilege to know him as a friend and to work with him as a community leader. It is my desire to encourage and support his candidacy for city counsel in May, 1974, our election time.

THE COURT: Why didn't your client get out of it the same way Paul Crawford got out of it when he found out what was involved?

MRS. SHIENTAG: I think he emotionally got out of it. He denied he was involved.

THE COURT: He was there on the day of the crime and had an assignment on the day of the crime.

MRS. SHIENTAG: That may have developed. But he originally came up with his portfolio with all his artwork looking for some clients in this area because he had due to the slightest depression at that time, especially in this area, lost his job and he was looking for business, or additional business in his design work which as I say is most impressive in its nature.

Perhaps he can explain that to your Honor. But I would like you to glance at this letter from the mayor and common council of Sea Pleasant. And also the letter he secured from the model city JC president, a Norman Friedman, who speaks about his being an extremely dedicated and he is

an ethical person. In fact, he would doubtless be furthering his freelance career if it were not for his civic undertaking. These are men of substance in the community.

May I hand this up to the Court, with the Court's indulgence?

These are people who have known him all his life. He has never been involved in the toils of the law before. He's got his daughter of three years. He's been married for four years. He has a home and he had great pressure to meet the payments on that home and that may have been due to him.

But perhaps your Honor would be willing to hear him.

THE COURT: I always ask a defendant when he has anything to say, Mrs. Shientag. Mr. Johnson.

DEFENDANT JOHNSON: I wish there was something very impressive that I could say to you. I stand before you I guess charged with the crime of conspiracy and I really in a sense can't deny that. I was there or I was here in New York. I was in the presence of the men that I guess contrived to plan this highjacking. I don't feel that I really had any intention of going through with anything violent or physical. I guess I was just kind of there hoping for some good for nothing. It was a foolish move or a foolish mistake.

THE COURT: There was some testimony on the trial

that at one point when Mr. Mann wasn't present that Mr. Meyers was going to take Mr. Mann's place and you were going to take Mr. Meyers' place. That was testimony I heard on the trial.

MR. KENNEY: I think it was the other way around, Mr. Meyers was going to take it.

MR. SHIENTAG: Do you know anything about that?

DEFENDANT JOHNSON: It may have been part of the plan put together. I guess in a sense I was prepared to do anything or I was listening to suggestions to do anything.

THE COURT: And you did have a role on April 5th?

MRS. SHIENTAG: Were you going to take active part, the Judge asks?

DEFENDANT JOHNSON: No, I really can't say in good conscience I was going to take any part -- active part in anything.

THE COURT: You had a job assigned to you on April 5th and you did it up to the time when things fell apart.

MR. KENNEY: Our understanding on April 5th Mr. Johnson was in the car with Chester Crawford.

THE COURT: That is what I understand.

DEFENDANT JOHNSON: I remained in New York because I had no place to go. I had come up with Mr. Mann and

everything, and I had no money, I was just here and I was kind of at their mercy. There was no place for me to stay. So while they were going around I was going around. I had to be with them all the time. It was my first time in New York. I didn't know where to go or anything.

THE COURT: All right. Mr. Meyers and Mr. Mann, both of you were involved in this with armed revolvers, loaded revolvers. In fact, I think the record will show that Mr. Mann was arrested on his way to New York with a loaded revolver in New Jersey. When one goes into the commission of a crime with a loaded revolver it is a little difficult to take the word "accidental," especially if the story is that this was supposed to be an inside job in which the postal employees were not involved, or, rather, the postal employees would not offer any resistance. It is difficult to understand why you would use a loaded revolver under such circumstances if that is your belief.

I sentence Mr. Mann and Mr. Meyers on their plea of guilty to second degree murder to 25 years and I will request the Bureau of Prisons to incarcerate both of them as close to Washington, D.C., as possible.

MR. MITCHELL: Your Honor, there are open counts on the defendant Mann. I move to dismiss them.

MR. MURPHY: No objection. One and three.

THE COURT: Mr. Mogel.

MR. MOGEL: Your Honor, same application as to the defendant Meyers. In addition, would your Honor consider imposing a sentence subject to Title 18 Section 4208A(2).

THE COURT: No, I will not.

MR. MOGEL: Thank you, your Honor.

THE COURT: Mr. Turner, while a plea has been made that you were really motivated and helped the government, you were really in this, you know what was involved, you knew guns were being used. You were going to participate if you were successful in the amount of over a hundred thousand dollars, if not twice that amount.

You have pled guilty to the crime of assault on an officer which was done as I gather to lighten your exposure to sentence which the government accepted in return for your testimony.

I sentence you to a term of ten years.

Mr. Johnson, you have pled guilty to the crime of conspiracy. I don't understand why you didn't get out of this when you found you were involved, why you didn't walk away from it. You participated in it and the steps that were taken while you were here --

MRS. SHIENTAG: If I may interrupt the Court, I believe we had no opportunity to cross examine as to that and

I was not present in court when that was adduced as to his participation.

THE COURT: Is there a doctor here?

The Court will stand adjourned.

Please leave the courtroom.

(Recess.)

THE COURT: As far as Mr. Turner is concerned, I understand there is a count 1 to which he also pled.

MR. KAPLAN: Yes, if your Honor please, we beg the Court's indulgence for Mr. Turner to remain seated and I move to dismiss the open count.

THE COURT: The open count is 2?

MR. KENNEY: That's correct.

THE COURT: That is dismissed, but I didn't impose a sentence on count 1.

MR. KENNEY: That's right.

THE COURT: I impose a sentence on count 1 of five years to run concurrently with count 3.

MR. KAPLAN: If your Honor please, would your Honor consider in Mr. Turner's case making him eligible for parole?

THE COURT: No, I will leave it up to the Parole Board. There was a murder in this case, Mr. Kaplan.

MR. KAPLAN: I understand that.

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THE COURT: A man was killed.

Mr. Johnson, as I said before, you indicated no desire to get out of this conspiracy and you knew what was involved.

DEFENDANT JOHNSON: Your Honor --

THE COURT: Yes?

DEFENDANT JOHNSON: I did, I expressed I didn't want to take any kind of part in any act of violence.

THE COURT: You were in the car with Chester Crawford following the van?

DEFENDANT JOHNSON: We weren't following the van. We were going around the streets.

THE COURT: You don't get involved with people in which a man was murdered.

DEFENDANT JOHNSON: He ended up down the street where I stood.

THE COURT: There wasn't the first thing, Mr. Crawford -- pardon me, Mr. Johnson -- you are here on several days. You were in Katz' Restaurant a number of times when they met.

DEFENDANT JOHNSON: Your Honor, I was there because it was a place we had to eat.

THE COURT: You went down when they staked out the job and you went down while they followed the route of the

truck on several occasions.

MRS. SHIENTAG: No, your Honor, as to that I believe the District Attorney informed me that overt acts one and two of the conspiracy didn't apply to my defendant, that he was not there.

THE COURT: You know the law, Mrs. Shientag. I can be in Oshkosh when an overt act is done and I am guilty of the crime. I don't have to be there.

MR. SHIENTAG: You asked why he was there. He was in the restaurant, not in the truck.

THE COURT: Nobody said he was in the truck; he was in Crawford's car.

THE COURT: I sentence you to four years on the plea of guilty to the conspiracy count.

MRS. SHIENTAG: Your Honor, may we have porvision A-2 apply?

THE COURT: Not in this case. As I indicated before, a man was murdered. Let the Parole Board determine when the release date should be.

There are two open counts.

MR. KENNEY: Yes, your Honor.

MRS. SHIENTAG: May I move their dismissal?

THE COURT: The application is granted.

MRS. SHIENTAG: And may we have the defendant's

wife visit him down in jail?

THE COURT: Yes.

MRS. SHIENTAG: And your Honor, would you have the defendant placed close to Washington?

THE COURT: I will make the same request in that regard.

That leaves Mr. Paul Crawford.

Mr. Crawford, it is true you are the least culpable of all these people, but you knew what was involved. You knew what was going to happen and you pled guilty to the crime of conspiracy.

I sentence you to a term of imprisonment of two and a half years.

That leaves counts 2 and 3 open. Is there a motion, Mr. Klempner?

MR. KLEMPNER: Yes, to dismiss the open counts, Judge.

MR. KENNEY: No objection.

THE COURT: Application granted.

MR. KLEMPNER: May Mr. Crawford address your Honor?

THE COURT: Yes.

DEFENDANT PAUL CRAWFORD: You say I get two and a half years. I already did seven months.

THE COURT: You get credit for that.

DEFENDANT PAUL CRAWFORD: Would you put me like in A-1 where I could work?

THE COURT: No, I will leave that up to the Parole Board. You served seven months against your term. They take that into consideration in fixing the parole date for your release.

DEFENDANT PAUL CRAWFORD: How much of that time do I have to do before I see the Parole Board?

THE COURT: That is up to them. That is not up to me. I don't fix that.

DEFENDANT PAUL CRAWFORD: Could you put me close to Washington, sir?

THE COURT: I will make that recommendation.

MR. KLEMPNER: You will make that same recommendation. Thank you.

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U.S. DISTRICT COURT
FILED
FEB 20 1974
S.D. OF N.Y.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

vs. : 73 CR. 606

JOHN TURNER, :

Defendant. :

----------x

Before:

HON. CHARLES M. METZNER,

District Judge

New York, N. Y.
January 8, 1974

APPEARANCES:

PAUL J. CURRAN, ESQ.,
United States Attorney
BY: JOHN J. KENNEY, ESQ.,
Assistant United States Attorney

JACK KAPLAN, ESQ.,
Attorney for Defendant

THE COURT: Mr. Kaplan?

MR. KAPLAN: Yes, your Honor. Mr. Turner, would you step forward please?

I represent John Turner, the gentleman at my left. I have had a number of conversations with Mr. Turner in preparing his defense. So has Mr. Clark in my office who is in the back here. I also spoke to Mr. Turner's wife who is in the front row in the brown dress and sweater.

I believe Mr. Turner's position in this case is different from all of the other defendants and in many ways unique in my experience. Mr. Turner has not lived a life of crime in the past. This case represents his first conviction. There is a pending charge in New Jersey that is related to a gun that is not related to this and it is my understanding that he has an eminently respectable defense to that charge.

Mr. Turner, until a couple of years ago, lived a completely law-abiding life as a fully employed individual. He worked in a bank. He left to better himself and worked for a trucking company; went back to the same bank. They were glad to have him back. And until a couple of years ago, he worked as a truck driver and as a supervisor of truck drivers, which is a difficult job and a responsible job. It requires training; it requires constantly detector tests.

It is a job in which the workers are constantly exposed to temptations of all sorts, temptations which Mr. Turner resisted.

He has a stable personality. His marriage is a solid one and a good one. His wife has worked for five, six, eight years for one hospital in New Jersey as a nurses aid, what nowadays would be called a para-professional, I think. They don't have any children.

He became involved in this case partly because he was doing such a good job of bettering his economic condition in life. He saved up enough while he was working as a trucking supervisor to buy himself a tractor trailer and go into business for himself. Then he bumped into the recession that we had a couple of years ago and he had to sell the truck and he was out of work. And it was at that moment in his life when he met FBI Agent DeBellis and became an informant for the Federal Bureau of Investigation. He was able to act as an informant primarily because so many of the people that he knew and had grown up with and had worked with were crooks.

He came from a poor and tough part of a dirty city and the work he did was not gentlemanly work, but he stayed clean throughout.

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apprehended committing the crime and who then agrees to cooperate with the government because he has no choice and he thinks that he can improve his situation.

I have asked Turner repeatedly about his motivations for becoming an informant -- I think that they would be important to your Honor to know -- and I am not sure I understand them now. Being an informant is a tough and a dangerous business. It is living out the spy who came in from the cold. And although Turner was paid for his services, he was not paid all that much. He could have done a lot better as a trucking supervisor, a job that he could get today if your Honor could see your way clear to putting him on probation.

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civilian medal in New Jersey. I do not cite that as an instance of good conduct to be weighed against the very serious offense he committed and that brings him in today. I cite that as a kind of information of the kind of man he is and the kind of treatment he deserves. He is not a threat to society. He is a basically law-abiding man.

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This particular case came about because Agent DeBellis was interested in making a case against Carroll and the older McCloskey who were regarded as very serious malfactors.

Turner did not know Carroll and McCloskey. Turner was obliged by the Agent to meet them and to come into contact with them and to participate with them.

The experience of participating with Carroll and McCloskey led to Turners being included in the plan for this highjacking of a post office truck. Turner did not report this highjacking in advance. That was a breach of the rules under which he operated as an informant, but it was not such a very big step from his behavior previously as an informant.

I have even myself regretted the necessity that law enforcement has of relying on informants to prove crimes. In some cases it does substantial harm to the individual involved and it also leaves a fairly sour taste in everyone's mouth. It is much better to have a crime where there is physical evidence, neutral evidence, finger prints or photographs or to have a crime where the eyewitnesses are good ones and can identify the participants. Nevertheless, the use of informants is a necessity, but in this case, Turner is a casualty of it. He was exposed to the situation.

He had his moral sensibilities and his sense dulled by the kind of activities he was encouraged and urged to engage in and when this particular planned highjacking came along, he fell victim to greed as well as these dulled moral

sensibilities. He was led to believe that there were millions of dollars to be made and this was his chance to get out of the life he was living.

Even so, he was ambivalent to the extent that he aroused Carroll's suspicions and became in the position of some peril because Carroll is a violent man and a dangerous man and a wreckless man. In the olden days, he would be called a desperado. He is the kind of guy that would rob stage coaches and there is no way that a man who is invited into a conspiracy of this sort with men of this type can get out of it. Once he is in, he is in, because if he tries to get out, there is the immediate suspicion that he is going to turn everybody in and so they have to do him in.

And I gather that although the kind of silence that we are talking about is sometimes scoffed at by people who think it only functions in detective stories, I have been informed in this case it was a very real fact of life and in my experience I am willing to believe that.

When the attempted highjacking resulted in the awful tragedy that did come about, Turner, ambivalent as I have said, basically law enforcement minded and truthful, as I have said, reported on the offense before anyone knew that he was one of the ones involved.

In fact, at the time that the indictment came down,

he was named as John Doe, also known as Jack, even though six weeks earlier he had, after the offense, but six weeks before the filing of the indictment, he had made a statement indicating his complicity in the offense.

He made that statement voluntarily and also, undoubtedly, because he thought that he might as well, since they would probably catch him anyway. But, again, I don't offer it as excusing anything that he did. He acted badly; there is no question about it. He contributed to the dangerousness of the enterprise -- there is no doubt about that -- although, as the driver of the truck, after it was stolen, I submit that his role was a relatively minor one.

Nevertheless, I don't think that Mr. Turner needs to be locked up anymore. I don't think he is a danger. I don't think he needs to be punished anymore. And I do think he has it in his capacity, he and his wife, to live out useful lives as respectable citizens making an appropriate contribution to society.

THE COURT: Mr. Kenney, Mr. Kaplan has made some statements of fact which I would like you to answer.

MR. KENNEY: Your Honor, we have no knowledge of the statement made by Turner implicating himself in the crime prior to the indictment in June. In fact, the earliest statement we know of, where he implicated himself, was on

June 25, 1973, a statement that was marked for identification at the trial.

He did make statements to DeBellis, the FBI Agent for whom he operated as an informant, prior to that time, implicating other people and indicating he had gotten the information from unknown sources in a hearsay manner.

I have no information and I have checked with DeBellis and other agents of the FBI of any highjacking of which Turner gave advance notice to the FBI. I have information only as to one highjacking in which he participated which he reported subsequent to the hijacking of the truck, but no advance notice.

Would the Court care to have me address myself to any other matter?

THE COURT: No, that is the one I was particularly interested in. Of course, the probation report does not indicate anything you say, Mr. Kaplan.

MR. KAPLAN: Well, I believe these are facts. I discussed them with Mr. Kenney at some length and I would think that Mr. Kenney would be in a position to either confirm or disaffirm. In fact, I asked him ahead of time.

THE COURT: He said he disaffirms.

MR. KENNEY: I disaffirm. If Mr. Kaplan wants to press the point, we would agree to have Mr. Turner's sentence

adjourned and recheck it.

THE COURT: He indicated to the probation officer everything he knows and nothing involved in his statement in the case involves statements of facts that you mentioned.

MR. KAPLAN: If DeBellis simply didn't mention it because no one asked him --

THE COURT: I do not think he was approached to state what Mr. Turner said to him as an informant. I do think that would call for any withholding of information by Mr. DeBellis.

Mr. DeBellis called my chambers yesterday. I told him to submit a letter. He said there is no point, because everything he would submit in a letter had already been told to the probation office.

MR. KAPLAN: If your Honor please, if you think those aspects of Turner's history are sufficiently interesting to merit it, I would specifically request Mr. Kenney direct those specific questions to Mr. DeBellis so that Turner is not in the position of --

THE COURT: I gather Turner didn't tell the truth in this case until it was obvious he was in it, which was after the date of the crime or after the date of the indictment.

MR. KENNEY: After John Doe was in it and after

the government pressed its search as to who John Doe was.

MR. KAPLAN: That is all I intend to say to your Honor. At the time he said he was in it, at that time the government didn't know he was in it.

THE COURT: But they were going to find it the week or week after, that is perfectly obvious.

MR. KAPLAN: It may be obvious --

THE COURT: That does not prove he came forward and nobody knew it. He turned himself forward when the trail was hot.

MR. KAPLAN: He gave the clues.

THE COURT: That does not make any difference.

MR. KAPLAN: I was addressing myself to his state of mind, if your Honor please.

THE COURT: I do not think Mr. Turner is as law-abiding and law enforcement minded as you say he is. It is true he acted as an informant for the FBI in one or two matters, but it was like "two for you, one for me, this one I keep, you get the other two." The record in this case shows they thought there was going to be three or four hundred thousand dollars in the truck and he was to get one sixth of it. You say he thought millions.

The government put in evidence six out of 22 bags which totalled over a million dollars, did they not, Mr.

Kenney?

MR. KENNEY: Slightly over two million.

THE COURT: So you were up in the million dollars and he was keeping this one himself.

MR. KAPLAN: No question.

THE COURT: So his desire to be a law enforcement officer was out of the window when the green was pushed in front of his nose.

MR. KAPLAN: Of course, he was in no position to be a law officer because the most he could be was an informant. As an informant he was in the position where he was subject to a maximum of temptation and minimum of controls because he was so exposed to participate. The normal rules don't apply. It is his job not to walk away and say, "I don't want anything to do with it." It is his job to say and listen and to participate.

Under those circumstances, I respectfully submit to your Honor that it is very easy for a man to fall victim to temptation. And if your Honor should see fit to allow Turner to return to society immediately, I would urge your Honor to emphasize the standing condition of probation that specifies --

THE COURT: Obviously, I will not do that.

MR. KAPLAN: -- that men should not act as informant.

I don't think Mr. Turner is fit to act as an informant anymore. He exhibited a capacity to fall victim to temptation and he should stay out of it. But, as regards his capacity to live a law-abiding and useful life, I stand by what I said.

THE COURT: All right.

Mr. Turner, do you have any statement to say to the Court before imposing sentence upon you?

THE DEFENDANT: No, your Honor, I do not.

THE COURT: Mr. Turner, while a plea has been made that you were really motivated and helped the government, you were really in this, you knew what was involved; you knew guns were being used. You were going to participate if you were successful in the amount of over a hundred thousand dollars, if not twice that amount.

If you plead guilty to the crime of assault on an officer which was done, as I gather, to lighten your exposure to sentence, which the government accepted in return for your testimony, I sentence you to a term of ten years.

THE COURT: As far as Mr. Turner is concerned, I understand there is a Count 1 to which he also pled.

MR. KAPLAN: Yes, if your Honor please, we beg the Court's indulgence for Mr. Turner to remain seated and I move to dismiss the open Count.

THE COURT: The open Count is 2?

MR. KENNEY: That is correct.

THE COURT: That is dismissed, but I did not impose a sentence on Count 1.

MR. KENNEY: That's right.

THE COURT: I impose a sentence on Count 1 of five years to run concurrently with Count 3.

MR. KAPLAN: If your Honor please, would your Honor consider in Mr. Turner's case, making him eligible for parole?

THE COURT: No, I will leave it up to the parole board. There was a murder in this case, Mr. Kaplan.

MR. KAPLAN: I understand that.

THE COURT: A man was killed.

I (We) hereby certify that the foregoing is a true and accurate transcript, to the be of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Julian Wolf

Official Court Reporter
U. S. District Court

FILED
JAN 8 1974
S. D. OF N. Y.

3021a

F.D.H Order S.D.J.

FILED
SEP 18 1973
S. D. OF N. Y.

United States v. Carroll, et al.
73 Cr. 855

Defendant Vincent McCluskey, by affidavit submitted to this court on September 6, 1973, indicated that there was a question regarding his competency to stand trial.

The court on that date signed an order directing that the movant be examined by Dr. David Abrahamsen pursuant to the procedures set forth in 18 U.S.C. § 4244. Subsequently, on September 12, 1973, movant requested permission that he also be examined by Dr. Stanley Portnow at his own expense.

The case was called for trial this morning, at which time the reports of both doctors were submitted to the court. After reading those reports, and upon the request by the attorney for the defendant that further examination be made of his client, the court refused to accept any plea at this time to the superseding indictment.

In lieu of holding a hearing at this time, the movant is committed to the custody of the Attorney General for further study and report as to the mental

Medical Center for Federal Prisoners
RECORD OFFICE
OCT 18 1973
RECEIVED

competency of the defendant to stand trial.

So ordered.

Dated: September 17, 1973

U. S. D. J.

Within named VINCENT McCLOSKEY delivered to the Warden,

Federal Det. Hdqts. 427 West St. NYC on September 16, 1973.

Thomas E. Ferrandina

Thomas E. Ferrandina
U.S. Marshal, SDNY.

Marshals Return

A TRUE COPY
RAYMOND F. [illegible], Clerk

By _____
Deputy Clerk

U S Marshal's Return - Southern District of New York
Received the order on the 16th day of Nov 1973 and executed same by taking custody of the within named Vincent McCloskey at the U.S.P. Kansas City Mo. (WDMo.) and transported him to the U.S.P. NY NY (SDNY) on the 16th day of Nov 1973

Thomas E Ferrandina
U S Marshal SDNY

by Henry J Hamilton
Deputy U S Marshal SDNY

UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

3023a

CHAMBERS OF
CHARLES M. METZNER
DISTRICT JUDGE

November 23, 1973

Jay Goldberg, Esq.
299 Broadway
New York, N. Y.

United States v. Vincent McCloskey
73 Cr. 855

Dear Mr. Goldberg:

I enclose herewith a copy of the report received from the Springfield Medical Center regarding your client.

Very truly yours,

Norman C. Kleinberg

Norman C. Kleinberg
Law Clerk

136

73-1334

JJK:nc

Approved: JOHN J. KENNEY
Assistant United States Attorney

Before: HONORABLE C. J. HARTENSTINE
United States Magistrate
Southern District of New York

UNITED STATES OF AMERICA,

- v -

WILLIAM MC CLOSKEY and
HARRY JOHNSON,

Defendants.

COMPLAINT

18 U.S.C. §§371, 1708, 1111, 1114

SOUTHERN DISTRICT OF NEW YORK, ss:

KENNETH J. KIEVIT, being duly sworn, deposes and says that he is a United States Postal Inppector and charges as follows:

1. From on or about the 1st day of January, 1973, up to and including the 19th day of June, 1973, in the Southern District of New York and elsewhere, WILLIAM MC CLOSKEY and HARRY JOHNSON, the defendants, and others to the government both known and unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to violate Sections 1708, Title 18, United States Code.

2. It was a part of said conspiracy the said defendants would and did go to the vicinity of Beekman and William Street, New York on April 5th, 1973 and there assist and participate in the armed robbery of a United States Mail Truck at the intersection of Beekman and William Streets.

3. In furtherance of said conspiracy and during the perpetration and attempted perpetration of the robbery of said mail truck, WILLIAM HICKEY, an employee of the United States Postal Service was killed while he was engaged in and on account of the performance of his duty, to wit, guarding said United States mail truck.

The bases for deponent's knowledge and for the forgoing charge are in part as follows:

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1. Statement by Chester Crawford that he participated in said crime and that HARRY JOHNSON was with him in his car at the time and also participated in the robbery of said mail truck.

2. Statements by Terrance Dewey Myers that he participated in said crime that Billy Mc Closkey was at the scene of said crime on April 5th, 1973 and participated in the armed robbery of said mail truck.

3. Investigation conducted by your deponent in the course of his official duties revealed that William Hickey, a postal guard was in fact killed by gun shot while guarding a United States Mail Truck at the time and place indicated above.

WHEREFORE, deponent prays that a warrant may issue for the apprehension of the above-named defendants and that they may be arrested and imprisoned, or bailed as the case may be.

Kenneth J. Kievit
KENNETH J. KIEVIT

Sworn to before me this

19th day of September, 1973.

C. J. Hartenstine

C.J.HARTENSTINE
U.S.MAGISTRATE
S.D.N.Y.

JJL:vk

3026a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA

73 CRIM. 583

-v-

THOMAS JOSEPH CARROLL, JOHN DOE a/k/a "JACK", VINCENT McCLUSKEY a/k/a "MIKE", ROBERT E. RIPPY a/k/a "RIPP", CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN,

Defendants.

INDICTMENT

73 Cr.

U.S. DISTRICT COURT
FILED
JUN 14 1973
S.D. OF N.Y.

----------x

The Grand Jury charges:

1. From on or about the 1st day of January, 1973, up to and including the day of the filing of this indictment, in the Southern District of New York and elsewhere, THOMAS JOSEPH CARROLL, JOHN DOE a/k/a "JACK," VINCENT McCLUSKEY a/k/a "MIKE," ROBERT E. RIPPY a/k/a "RIPP," CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN, the defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to violate Sections 1708 and 2114 Title 18, United States Code.

2.a It was a part of said conspiracy that the defendants would steal and take mail bags from a letter and mail carrier and from a mail route and other authorized depository for mail matter, in violation of Section 1708, Title 18, United States Code.

2.b It was further a part of said conspiracy that the defendants, in attempting to effect a robbery of persons having lawful charge, control and custody of mail matter and other property of the United States, would and did wound and put in jeopardy the lives of the said persons by the use of dangerous weapons.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts among others were committed in the Southern District of New York:

1. On or about the 20th day of March, 1973, CHESTER CRAWFORD, PAUL CRAWFORD and TERRENCE DEWEY MYERS went to the vicinity of Wall Street, New York, New York.

2. On or about the 22nd day of March, 1973, CHESTER CRAWFORD met with THOMAS JOSEPH CARROLL and VINCENT MC CLUSKEY a/k/a "MIKE" in the vicinity of Fulton Street, New York, New York.

3. On or about the 5th day of April, 1973, THOMAS JOSEPH CARROLL, JOHN DOE a/k/a "JACK", VINCENT McCLUSKEY a/k/a "MIKE", CHESTER CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN, met at Katz's Delicatessen, Houston Street, New York, New York.

(Title 18, United States Code, Section 371)

COUNT TWO

The Grand Jury further charges:

On or about the 5th day of April 1973, in the Southern District of New York, THOMAS JOSEPH CARROLL, JOHN DOE a/k/a "JACK," VINCENT McCLUSKEY a/k/a "MIKE," ROBERT E. RIPPY a/k/a "RIPP," CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN, the defendants,

unlawfully, wilfully and knowingly and in the perpetration and attempted perpetration of a robbery in violation of Title 18, United States Code, Section 2114, did kill an employee of the United States Postal Service, to wit, William Hickey, while he was engaged in and on account of the performance of his official duties, to wit, the guarding of said United States mail truck.

(Title 18, United States Code, Sections 1111, 1114 and 2)

COUNT THREE

The Grand Jury further charges:

On or about the 5th day of April, 1973, in the Southern District of New York THOMAS JOSEPH CARROLL, JOHN DOE a/k/a "JACK," VINCENT McCLUSKEY a/k/a "MIKE," ROBERT E. RIPPY a/k/a "RIPP," CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN, the defendants, unlawfully wilfully and knowingly, did assault a person, to wit, Crawford Lawrence, having lawful charge, control and custody of mail matter and of property of the United States, with intent to rob, steal and purloin such mail matter and property of the United States, and in effecting and attempting to effect such robbery, did wound and put in jeopardy the life of the said Crawford Lawrence by use of a dangerous weapon, to wit, a .32 revolver.

(Sections 2114 and 2, Title 18, United States Code.)

Mrs. June M. Burke
FOREMAN

PAUL J. CURRAN
United States Attorney

3 CRIM. 583

Form No. USA-33s-274 (Ed. 9-25-58)

ed States District Court

UTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

IAS JOSEPH CARROLL, JOHN DOE
a "JACK", VINCENT McCLUSKEY
a "MIKE", ROBERT E. RIPPY
a "RIPP", CHESTER CRAWFORD,
CRAWFORD, TERRENCE DEWEY
S and GEOFFREY MATTHEWS
,

Defendants.

INDICTMENT

e 18, United States Code,
ion 371

e 18, United States Code,
ions 1111, 1114 and 2

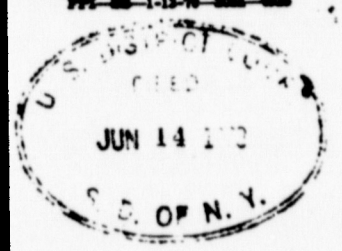
e 18, United States Code
ions 2114 and 2.

PAUL J. CURRAN
United States Attorney.

UE BILL

Foreman.

FFI—SS—1-13-70—3284—3285



JUDGE METZNER

JUNE 14, 1973 DEFTS - ROBERT E. RIPPY & PAUL CRAWFORD, B/W ORDERED
PALMIERI, J

JUNE 15, 1973 DEFTS. PAUL CRAWFORD and JOHN DOE, A/K/A "JACK" B/W ORDERED
PALMIERI, J

JUN 18 1973 Defts Thomas J. Carroll – Bail $200,000.
Vincent McCluskey – Bail $200,000.
Chester Crawford – Bail $250,000.
Terrence Dewey – To be arraigned counsel by Mag.
Geoffrey Mann " " " " "
Court directs a plea of not guilty on for each deft. (5 named above)
all 5 defts remanded in lieu of bail. Case assigned to
Judge Metzner).
Mgoff, D.

JUN 19 1973 Application for reduction of bail on behalf of Vincent McCluskey is denied following argument.

Metzner, J.

3029a

JUN 20 1973

3030a

Application by the Govt to vacate the Bench Warrant as to Paul Crawford is granted.

Metzner. J.

JUN 25 1973

Application by the Govt to vacate the Bench warrant as to Robert E. Rippy is granted

Metzner. J.

JJK:zg

3031a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CRIM. 6

- x

UNITED STATES OF AMERICA :

-v- : INDICTMENT

THOMAS JOSEPH CARROLL, JOHN DOE a/k/a "JACK", VINCENT McCLUSKEY a/k/a "MIKE", ROBERT E. RIPPY a/k/a "RIPP", CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN, : 73 Cr.

Defendants. :

- x

U.S. DISTRICT COURT
FILED
JUN 19 1973
S.D. OF N.Y.

The Grand Jury charges:

1. From on or about the 1st day of January, 1973, up to and including the day of the filing of this indictment, in the Southern District of New York and elsewhere, THOMAS JOSEPH CARROLL, JOHN DOE a/k/a "JACK", VINCENT McCLUSKEY a/k/a "MIKE", ROBERT E. RIPPY a/k/a "RIPP", CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN, the defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to violate Sections 1708 and 2114, Title 18, United States Code.

2.a It was a part of said conspiracy that the defendants would steal and take mail bags from a letter and mail carrier and from a mail route and other authorized depository for mail matter, to wit, from a United States mail truck in violation of Section 1708, Title 18, United States Code.

2.b It was further a part of said conspiracy that the defendants, in attempting to effect a robbery of persons having lawful charge, control and custody of mail matter and other property of the United States, would and did put in jeopardy the lives of the said persons by the use of dangerous weapons.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts among others were committed in the Southern District of New York:

1. On or about the 20th day of March, 1973, CHESTER CRAWFORD, PAUL CRAWFORD and TERRENCE DEWEY MYERS went to the vicinity of Wall Street, New York, New York.

2. On or about the 22nd day of March, 1973, CHESTER CRAWFORD met with THOMAS JOSEPH CARROLL and VINCENT McCLUSKEY a/k/a "MIKE" in the vicinity of Fulton Street, New York, New York.

3. On or about the 5th day of April, 1973, THOMAS JOSEPH CARROLL, JOHN DOE a/k/a "JACK", VINCENT McCLUSKEY a/k/a "MIKE", CHESTER CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN, met at Katz's Delicatessen, Houston Street, New York, New York.

(Title 18, United States Code, Section 371)

COUNT TWO

The Grand Jury further charges:

On or about the 5th day of April 1973, in the Southern District of New York, THOMAS JOSEPH CARROLL, JOHN DOE a/k/a "JACK", VINCENT McCLUSKEY a/k/a "MIKE", ROBERT E. RIPPY a/k/a "RIPP", CHESTER CRAWFORD, PAUL CRAWFORD,

TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN, the defendants unlawfully, wilfully, knowingly, with malice aforethought and in the perpetration and attempted perpetration of a robbery in violation of Title 18, United States Code, Section 2114, did murder and kill an employee of the United States Postal Service, to wit, William Hickey, while he was engaged in and on account of the performance of his official duties, to wit, the guarding of said United States mail truck.

(Title 18, United States Code, Sections 1111, 1114 and 2)

COUNT THREE

The Grand Jury further charges:

On or about the 5th day of April, 1973, in the Southern District of New York THOMAS JOSEPH CARROLL, JOHN DOE a/k/a "JACK", VINCENT McCLUSKEY a/k/a "MIKE", ROBERT E. RIPPY a/k/a "RIPP", CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN, the defendants, unlawfully wilfully and knowingly, did assault a person, to wit, Crawford Lawrence, having lawful charge, control and custody of mail matter and of property of the United States, with intent to rob, steal and purloin such mail matter and property of the United States, and in effecting and attempting to effect such robbery, did wound and put in jeopardy the life of the said Crawford Lawrence by use of a dangerous weapon, to wit, a .32 revolver.

(Sections 2114 and 2, Title 18, United States Code.)

Mrs. Irene M. Burke
FOREMAN

Paul J. Curran
PAUL J. CURRAN
United States Attorney

73 CRIM. 506

Form No. USA-33s-274 (Ed. 9-25-58)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

THOMAS JOSEPH CARROLL, JOHN DOE a/k/a "JACK", VINCENT McCLUSKEY a/k/a "MIKE", ROBERT E. RIPPY a/k/a "RIPP", CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN,

Defendants

INDICTMENT

73 Cr.

United States Attorney.

A TRUE BILL

Foreman.

PPS—GPO—1-13-70—300M—GPO

U.S. DISTRICT COURT FILED JUN 19 1973 S.D. OF N.Y.

a JUDGE METZNER

June 20, 1973

The defendant Paul Crawford with his atty and the A.U.S.A present pleads Not Guilty.

Bail - $35,000.00

Defendant remanded in lieu of bail.

Metzner.

JUN 25 1973

d The defendant ~~Edward~~ Robert E Rippy with hm atty and the A.U.S.A present, pleads Not Guilty.

Defendant remanded in lieu of bail.

The defendants Thomas J Carroll, Vincent McCluskey and Chester Crawford, with their

Atty and the A.U.S.A present plead Not Guilty.
Bail as to (Carroll) fixed at $ 200,000.
Bail as to (McCluskey) fixed at $ 200,000.
Bail as to (Chester Crawford) fixed at $ 250,000
Defendants remanded in lieu of bail. GJ

The defendants Terrence D. Myers and Geoffrey M. Mann atty present - representing Mr Mann (Temporary) was Mr M. Mogel - with the A.U.S.A present - plead not Guilty
Bail as to (Myers) fixed at $ 250,000
Bail as to (Mann) fixed at $ 250,000
Defendants remanded in lieu of bail.

Metzner

JJA:wp
73-1365

UNITED STAT DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

3036a

UNITED STATES OF AMERICA

73 CRIM. 855

- v -

INDICTMENT

THOMAS JOSEPH CARROLL, JOHN TURNER, a/k/a "Jack", VINCENT MC CLUSKEY, a/k/a "Mike", ← (12/10/73 amended to McCloskey) ROBERT E. RIPPY, a/k/a "Ripp", CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN,

[redacted]

Defendants.

U.S. DISTRICT COURT FILED S.D. OF N.Y.

The Grand Jury charges:

1. From on or about the 1st day of January, 1973, up to and including the day of the filing of this Indictment, in the Southern District of New York and elsewhere, THOMAS JOSEPH CARROLL, JOHN TURNER, a/k/a "Jack", VINCENT MC CLUSKEY, a/k/a "Mike", ROBERT E. RIPPY, a/k/a "Ripp", CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN, the defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to violate Sections 1708 and 2114, Title 18, United States Code.

2.a It was a part of said conspiracy that the defendants would steal and take mail bags from a letter and mail carrier and from a mail route and other authorized depository for mail matter, to wit, from a United States mail truck in violation of Section 1708, Title 18, United States Code.

2.b It was further a part of said conspiracy that the defendants, in attempting to effect a robbery of persons having lawful charge, control and custody of mail matter and

JAN 8 1974

3037a

Rider

For sentencing.

The defendant John Turner with his atty and the A U S A present, is sentenced to Five (5) years on count (1) and Ten (10) years on count (3) ~~[illegible]~~ SENTENCED IMPOSED IN count (1) is to run concurrently with count (3).
Count (2) is dismissed.
Defendant is remanded.

Metzner J.

The defendant Paul Crawford with his atty and the A U S A present, is sentenced to Two and a Half (2½) years on count (1) in prison.
Counts (2) and (3) are dismissed
The Court recommends incarceration close to Washington D.C. [redacted].
Defendant remanded.

Metzner J.

The defendant Geoffrey M Mann with his atty and the A U S A present is sentenced to Twenty Five (25) years in prison on count (2).
Counts (1) and (3) are dismissed.
The Court recommends incarceration close to [redacted] Wash, DC.
[redacted];

JAN 8 1974

Continued sentencing.

The defendant Terrence D Myers with his atty and the A U S A present is sentenced to Twenty Five (25) years in prison on count (2). Counts (1) and (3) are dismissed.
The court recommends incarceration [redacted] to [redacted]
Wash., D.C [redacted].
Defendant remanded.

Hetzner J.

DEC. 26, 1973

BEFORE: METZNER, J.

U.S.A. 30398
v.
CARROLL ET AL
73 CR 855

DEFT. THOMAS JOSEPH CARROLL - GUILTY ON COUNTS (1)-(2) AND (3)
PRESENTENCE REPORT ORDERED.
SENTENCE JAN 25, 1974
ALL MOTIONS RESERVED FOR DAY OF SENTENCE; ALL PAPERS FILED BY JAN 23, 1974.
DEFT. REMANDED

DEFT. VINCENT McCLOSKEY - GUILTY ON COUNTS (1)-(2) AND (3)
PRESENTENCE REPORT ORDERED
SENTENCE JAN. 25, 1974
ALL MOTIONS RESERVED FOR DAY OF SENTENCE, ALL PAPERS FILED BY JAN. 23, 1974.
DEFT. REMANDED

V. McCloskey. Guilty on cts. 1-2-3 (See entry on 73 CR 972)

DEFT. ROBERT E. RIPPY - NOT GUILTY -
WRIT SATISFIED.

NOTE: See attached rider for sentences.

JAN 25 1974 3040a

(JF) [redacted] The defendant Thomas Joseph Carroll [redacted] the A U S A present, is sentenced to life in prison on count (2). Twenty Five (25) years on count (3) and Five years on count (1). Sentence on counts (1) and (3) to run concurrently with each other and concurrently with sentence imposed on count (2) The defendant is advised of his right to appeal. Defendant is remanded to the Federal Detention Headquarters @ 427 West St, New York, N.Y. pending appeal.

Metzner, J (41)

The defendant Vincent McCloskey with his atty and the A U S A present is sentenced to life in prison on count (2). Twenty Five (25) years on count (3) and five years on count (1).
Sentence on counts (1) and (3) to run concurrently with each other and concurrently with sentence imposed on count (2).
The defendant is advised of his right to appeal. Defendant is remanded to the Federal Detention Headquarters @ 427 West St, N.Y. N.Y. pending appeal

Metzner, J (L)

aforethought and in the perpetration and attempted perpetration of a robbery in violation of Title 18, United States Code, Section 2114, did murder and kill an employee of the United States Postal Service, to wit, William Hickey, while he was engaged in and on account of the performance of his official duties, to wit, the guarding of said United States mail truck.

(Title 18, United States Code, Sections 1111, 1114 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 5th day of April, 1973, in the Southern District of New York THOMAS JOSEPH CARROLL, JOHN TURNER, a/k/a "Jack", VINCENT MC CLUSKEY, a/k/a "Mike", ROBERT E. RIPPY, a/k/a "Ripp", CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN, the defendants, unlawfully, wilfully and knowingly, did assault a person, to wit, Crawford Lawrence, having lawful charge, control and custody of mail matter and of property of the United States, with intent to rob, steal and purloin such mail matter and property of the United States, and in effecting and attempting to effect such robbery, did wound and put in jeopardy the life of the said Crawford Lawrence by use of a dangerous weapon, to wit, a .32 revolver.

(Sections 2114 and 2, Title 18, United States Code.)

/s/ Irene M Burke
FOREMAN

PAUL J. CURRAN
United States Attorney

other property of the United States, would and did put in jeopardy the lives of the said persons by the use of dangerous weapons.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts among others were committed in the Southern District of New York:

1. On or about the 20th day of March, 1973, CHESTER CRAWFORD, PAUL CRAWFORD and TERRENCE DEWEY MYERS went to the vicinity of Wall Street, New York, New York.

2. On or about the 22nd day of March, 1973, CHESTER CRAWFORD met with THOMAS JOSEPH CARROLL and VINCENT MC CLUSKEY, a/k/a "Mike", in the vicinity of Fulton Street, New York, New York.

3. On or about the 5th day of April, 1973, THOMAS JOSEPH CARROLL, JOHN TURNER, a/k/a "Jack", VINCENT MC CLUSKEY, a/k/a "Mike", CHESTER CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN, met at Katz's Delicatessen, Houston Street, New York, New York.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

On or about the 5th day of April, 1973, in the Southern District of New York, THOMAS JOSEPH CARROLL, JOHN TURNER, a/k/a "Jack", VINCENT MC CLUSKEY, a/k/a "Mike", ROBERT E. RIPPY, a/k/a "Ripp", CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN, the defendants unlawfully, wilfully, knowingly, with malice

CRIM. 8[illegible]

JUDGE METZNER

Form No. USA-23s-274 (Ed. 9-25-58)

ed States District Court
OUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

MAS JOSEPH CARROLL, et al.,

Defendants.

INDICTMENT
73 Cr.

violation of 18 U.S.C. 371,
1111, 1114, 2114, and 2.)

J. CURRAN
United States Attorney

UE BILL

Irene M. Bucke
Foreman

U.S. DISTRICT COURT
FILED
SEP 11 1973
S.D. OF N.Y.

SEP 12 1973

The defendant Robert E Riffy with his atty and the U.S.A present pleads not guilty ~~Defendant remanded~~ Writ adjourned to 9-17-73 Hearing as to defendant Riffy held. Motion denied.

J. Metzner J.

SEP 17 1973

The defendant John Jacobs with his atty and the U.S.A present pleads Not Guilty and is remanded for trial. Bail conditions continued.

The defendant Charles Campbell with his atty and the U.S.A present, pleads Guilty to count (2 - made on the 2nd digit - a class misdemeanor offense. The accepted. Bail conditions as set on 7 3 cr 606 are continued

3043a

SEP 21 1973

Deft. defendant John Turner with his atty and the U.S.A. by Asst. withdraws his plea of Not Guilty and pleads Guilty to count One (1) and to count Three (3) of the ~~same~~ subst. offense ~~charged in said~~ (#) ~~indictment~~

(# accepted

Bail continued as set on 73 cr. 606

Metzner, J.

DEC 10 1973

Deft. McCluskey with his atty and the A.U.S.A. present pleads not guilty. Plea accepted Bail conditions as set in 73 cr. 606 are continued

Metzner, J.

DEC 10 1973

Motion by the Govt to amend the name of Vincent McCluskey in this indictment to Vincent McCloskey - no opposition - Motion granted

Jury empaneled and sworn with (4) alternate jurors. Trial begun as to Thomas J. Carroll - Vincent McCloskey - Robert E. Rippy, and William McCloskey from indictment # 73 cr 972 -

Indictment # 73 cr 855 and # 73 cr. 972 are consolidated for trial. Deft. Rippy produced in Court on a writ.

Metzner, J.

DEC 11 1973 Trial continued. Dft. Kippy produced in Court on a writ.
Metzner.

DEC 12 1973 Trial continued. Dft Kippy produced in Court on a writ
Metzner.

DEC 13 1973
Trial continued. Dft Kippy produced in Court on a writ.
Metzner.

DEC 14 1973 Trial continued. Dft Kippy produced in Court on a writ
Metzner.

DEC 17 1973 Trial continued. Dft Kippy produced in Court on a writ.
Metzner.

DEC 18 1973 Trial continued
Metzner.

DEC 20 1973
Trial continued. Govt rests.
Motion to dismiss count One (1) as to dft Kippy is granted. Defts rest
Metzner.

DEC 24 1973 — Summations
Metzner.

DEC 26 1973 Trial continued. Court charge — Marshals sworn — Jury retires.
Trial concluded. Jury Verdict
(Over) (See Attached Verdict)

The defendant Paul Crawford with his atty and the U.S.A. present pleads Guilty to count 2. Plea accepted. Bail conditions as set in 73 cr. 606 are continued.

3046a

The defendant Jeffrey M. Mann with his atty and the U.S.A present pleads Guilty to a lesser included offense made a part of Count 1. Plea accepted. Bail conditions as set in 73 cr. 606 are continued.

The defendant Thomas D. Hayes with his atty and the U.S.A present pleads Guilty to a lesser included offense made a part of Count 1. Plea accepted. Bail conditions as set in 73 cr. 606 as continued.

The defendant Vincent McCluskey with his atty and the U.S.A. present is committed by order of the Court to Springfield Mo. pursuant to Title 18, U.S.C. Section 4246.

The defendant ~~Robert~~ Robert E. Kipper ~~with~~ released on own recognizance with his atty and the U.S.A present having filed not guilty. Writ notes filed.

The defendant Thomas J. Carroll with his atty and the U.S.A present pleads not guilty. plea accepted. Bail conditions as set in 73 cr. 606 are continued.

3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v. 73 Cr. 606

THOMAS JOSEPH CARROLL, JOHN DOE a/k/a "JACK", VINCENT McCLUSKEY, a/k/a "MIKE", ROBERT E. RIPPY, a/k/a "RIPP", CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN,

Defendants.

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DEFENDANT VINCENT McCLUSKEY's
REQUESTS TO CHARGE

JOHN F. MARTIN
Attorney for Defendant McCLUSKEY
Office & P. O. Address
342 Madison Avenue
New York, New York 10017
Tel. (212) 279-6095

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

73 Cr. 606

THOMAS JOSEPH CARROLL, JOHN DOE, a/k/a "JACK", VINCENT McCLUSKEY, a/k/a "[redacted]", ROBERT E. RUPPY, a/k/a "RIPP", CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN,

Defendants.

DEFENDANT VINCENT McCLUSKEY's
REQUESTS TO CHARGE

Defendant Vincent McCluskey respectfully requests the Court to include the following in its charge to the jury:

Request No. 1

D

Testimony of Informer - Interested Witness

The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or by prejudice against defendant.

Hoffa v. United States, 385 U.S. 293, 312 n. 14, 87 S.Ct. 408, 418, 17 L.Ed.2d 374 (1966), reh. den. 386 U.S. 940, 951, 87 S.Ct. 970, 17 L.Ed.2d 880 (1967); Rush v. United States, 126 U.S.App.D.C. 174, 375 F.2d 602 (1967).

Request No. 2

Mere Presence Not Sufficient

Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime, unless you find beyond reasonable doubt that the defendant was a participant and not merely a knowing spectator.

Pinkney v. United States, 380 F.2d 882 (5th Cir. 1967), cert. den. 390 U.S. 908, 88 S.Ct. 831, 19 L.Ed.2d 876;

Nipp v. United States, 422 F.2d 509 (10th Cir. 1970), cert. den. 399 U.S. 913, 90 S.Ct. 2213, 26 L.Ed.2d 569. cert. den. 397 U.S. 1008, 90 S.Ct. 1235, 25 L.Ed.2d 4[illegible].

Request No. 3

Impeachment - Inconsistent Statements or Conduct

The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of these statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

United States v. Kahn, 381 F.2d 824, 835-836 (7th Cir. 1967), cert. den. 389 U.S. 1015, 88 S.Ct. 591, 19 L.Ed.2d 661, reh. den 392 U.S. 948, 88 S.Ct. 2272, 20 L.Ed.2d 1413; United States v. Santos, 372 F.2d 177, 180 (2d Cir. 1967).

See also: The Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, P. 164.

Request No. 4

Impeachment - Conviction of Felony

The testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a felony, that is, of a crime punishable by imprisonment for a term of years. Prior conviction does not render a witness incompetent to testify, but is merely a circumstance which you may consider in determining the credibility of the witness. It is the province of the jury to determine the weight to be given to any prior conviction as impeachment.

Medina v. United States, 254 F.2d 228 (9th Cir. 1958), cert. den. 358 U.S. 846, 79 S.Ct. 72, 3 L.Ed.2d 80 (1958); Robersen v. United States, 249 F.2d 737, 72 A.L.R.2d 434 (5th Cir. 1957), cert. den. 356 U.S. 919, 78 S.Ct. 704, 2 L.Ed.2d 715 (1958); United States v. Escobedo, 430 F.2d 14, 18 (7th Cir. 1970).

Request No. 5

No Inference Against Defendant by Reason of his Failure to Testify.

Members of the Jury, I charge you that in every criminal case, without exception, there is a rule which every defendant has the privilege and right to rely on. It is the rule that no defendant under any circumstances is compelled to take the witness stand or offer any testimony whatever. By pleading "not guilty", the defendant has in effect denied the charges on which he is being tried and has put into issue every material accusation against him stated in the indictment. The law has given him the right to say to the prosecution in effect: Prove your case against me beyond a reasonable doubt; it is my judgment that the situation is such that I am not bound to take the witness stand and the law gives me that right, and the law gives me that privilege.

It is the prosecution which must prove the defendant guilty and the defendant cannot be required to testify or to disprove anything.

Any accused person has the right to stand mute. This right has a historical basis of several centuries having been part of the law of England and having become part of the law of this country ever since its inception.

The right to stand mute or to remain silent is a constitutional right granted to every person and the exercise of this constitutional right to remain mute or silent may not be considered by you as any indication of guilt or as an admission of guilt. In fact the defendant Vincent McCluskey's remaining mute may not be considered by you at all

for any purpose. The presumption of innocence and the Government's burden of proving guilt beyond a reasonable doubt will be explained to you further in my charge[or, has already been explained to you, as the case may be].

Here the defendant Vincent McCluskey did not come forward as a witness or take the witness stand. I charge you that this was his absolute constitutional right. I charge you that you must not allow this fact in any way to prejudice him or to consider it as an indication or admission or inference of guilt.

United States v. Schwartz, 398 F.2d 464 (7th Cir. 1968) cert. den. 393 U.S. 10062, 89 S.Ct. 714, 21 L.Ed.2d 705;

Holland v. United States, 348 U.S. 121, 138-139, 75 S.Ct. 127, 136-137, 99 L.Ed. 150 (1954).

Request No. 6

Presumption of Innocence - Burden of Proof - Reasonable Doubt

The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a "clean slate" - with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense - the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

A reasonable doubt exists whenever, after careful and impartial consideration of all the evidence in the case, the jurors do not feel

convinced to a moral certainty that a defendant is guilty of the charge.]

See: Wright, Federal Practice and Procedure: Criminal Sec. 500; Crim. Jury Instr. D.C. Nos. 8, 9

Holt v. United States, 218 U.S. 245, 253, 31 S. Ct. 26, 54 L. Ed. 1021 (1910); Agnew v. United States, 165 U.S. 36, 49-50, 52, 17 S. Ct. 235, 240-241, 41 L. Ed. 624 (1897).

Boatright V. United States, 105 F. 2d 737 (8th Cir. 1939); United States v. Link, 202 F. 2d 592 (3d Cir. 1953).

Request No. 7

Indictment but an Accusation - Direct Evidence - Circumstantial Evidence

An indictment (information) is but a formal method of accusing a defendant ofa crime. It is not evidence of any kind against the accused.

There are two types of evidence from which a jury may properly find a defendant guilty of a crime. One is direct evidence - such as the testimony of an eyewitness. The other is circumstantial evidence - the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

Indictment not evidence: United States v. Walker, 313 F.2d 236, 241 (6th Cir. 1963), cert. den. 374 U.S. 807, 83 S. Ct. 1695, 10 L.Ed.2d 1031; Black v. United States, 309 F.2d 331, 343 (8th Cir. 1962), cert. den. 372 U.S. 934, 83 S.Ct. 880, 9L.Ed.2d 765; United States v. Senior, 274 F.2d 613, 617 (7th Cir. 1960); United States v. Sutton, 312 Fed. Supp. 969, 972 (Dist.Ct. Ariz. 1970) Judgmt. aff'd. 446 F.2d 916 (C.A.)cert.den. 404 U.S. 10025, 92 S.Ct. 699, 30 L.Ed.2d 675.

Request No. 8

Number of Witnesses Not Necessarily Controlling

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

Request No. 9

Confession - Incriminating Co-defendant

A confession made outside of court by one defendant may not be considered as evidence against another defendant not a party to such confession.

Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)

Request No. 10

D

Admission - Incriminating Co-Defendant

An admission or incriminatory statement made or act done by one defendant, outside of court, may not be considered as evidence against another defendant who was not present and so did not see the act done or hear the statement made.

Request No. 11

Insanity

The defendant Vincent McCluskey in this case asserts the defense of insanity.

Under the defendant's plea of "not guilty", there is an issue as to his sanity at the time of the alleged offense. The law does not hold a person criminally accountable for his conduct while insane, since an insane person is not capable of forming the intent essential to the commission of a crime.

The sanity of the defendant at the time of the commission of the alleged offense is an element of the crime charged and must be established by the government beyond reasonable doubt, just as it must establish every other element of the offense charged.

A defendant is insane within the meaning of these instructions if, at the time of the alleged criminal conduct, as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

As used in these instructions, the terms 'mental disease' or 'defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

For the purpose of throwing light upon the mental condition of the accused at the time of the alleged offense, the jury may consider

evidence of his mental state both before and after that time. The material issue, however, is whether the defendant was sane or insane at the time of the alleged criminal conduct.

Temporary insanity, as well as insanity of longer duration, is recognized by the law.

If the evidence in the case leaves you with a reasonable doubt as to whether the defendant was same at the time of the alleged offense, you will find him not guilty, even though it may appear that he was sane at earlier and later times.

In considering the mental state of the accused, the jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

The defendant Vincent McCluskey is entitled to have the question of his sanity submitted to you the members of the jury for your determination even though he has offered no expert testimony to support his claim.

Lake v. United States, 407 F.2d 908 (1969);

United States v. Freeman, 357 F.2d 606 (2nd Cir. 1966);

United States v. Green, 468 F.2d 116 (4th Cir. 1972)

Request No. 12

Where Insanity Claim Fails - Intent Issue Still Remains

Where a defendant has raised the issue of his insanity, and the jury finds from the evidence in the case beyond a reasonable doubt that the accused was not insane at the time of the alleged offense, it is still the duty of the jury to consider all the evidence in the case which may aid determination of state of mind, including all evidence offered on the issue as to insanity, in order to determine whether the defendant acted or failed to act with specific intent, as charged.

If the evidence in the case leaves the jury with a reasonable doubt whether the mind of the accused was capable of forming, or did form, specific intent to commit the crime charged, the jury should acquit the accused.

As stated before, the law never imposes upon a defendant the burden or duty of calling any witnesses or producing any evidence.

Request No. 13

Testimony of an Accomplice

(Alternate Charge - 1)

The defendant may not be convicted of any offense upon the testimony of an alleged accomplice unless supported by corroborative evidence tending to connect the defendant with the commission of such offense.

An accomplice means a witness in a criminal action who, according to the evidence adduced in such action may reasonably be considered to have participated in: (a) the offense charged; or (b) an offense based upon the same or some of the same facts or conduct which constitute the offense charged.

A witness who is an alleged accomplice as I have just defined to you, is no less such an accomplice by reason of the fact that a prosecution or conviction of such alleged accomplice is barred or precluded by some defense or exemption such as immunity from prosecution granted to such alleged accomplice, or previous prosecution or other incidental or collateral impediment to the prosecution or conviction of such alleged accomplice which does not affect the conclusion that such witness-accomplice engaged in the conduct constituting the offense involved herein, together with the required mental state demanded by the law.

The corroboration of an alleged accomplice must not come from another alleged accomplice; in simple English, one accomplice may not

corroborate another. The corroboration necessary may not be great or substantial, but it must be some evidence tending to show that the defendant Vincent McCluskey committed all the elements of the crime charged in the indictment.

(Note to the Court: This request to charge is admittedly a request that is not in conformity with the decisions of the Federal Courts of most circuits with regard to the issue of corroboration. This charge is based upon Rule 26 of the Federal Rules of Criminal procedure and Keliher v. United States, 193 F. 8, 15 (1st Cir. 1912); and People of the Territory of Guam v. Camacho, 470 F.2d 919 (9th Cir. 1972); Criminal Procedure Law (New York) Sec. 60.22.)

Members of the Jury, throughout my charge to you on the law regarding accomplice's testimony, I may on some occasions have used the term "accomplice" and on other occasions used the term "alleged accomplice". In all instances you are to treat my comments as meaning an "alleged accomplice". Under no circumstances are you to infer from the use of the term "alleged accomplice" that the defendant Vincent McCluskey is in any way considered to be guilty. To the contrary, the defendant Vincent McCluskey, as indeed all defendants in a criminal case, is absolutely presumed to be innocent until proven guilty, beyond a reasonable doubt. I have already discussed with you the requirements of reasonable doubt in my charge.

Request No. 13

Testimony of an Accomplice

(Alternate Charge - 2)

An accomplice is one who unites with another person in the commission of a crime voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged.

The testimony of an alleged accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care.

The uncorroborated testimony of an alleged accomplice must be corroborated and cannot be the sole basis of a conviction, if you find the testimony of the alleged accomplice to be either "incredible" or "unsubstantial.

Experience has shown that accomplices may be motivated to place the responsibilities on others than themselves. Accordingly, an alleged accomplice's testimony should be closely examined, weighed with care, checked with the facts which you find to exist in this case, and against the evidence which may corroborate them, and then you should give the testimony such weight as you deem proper.

You should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe that unsupported

testimony beyond a reasonable doubt.

Adapted in part from the charge in United States v. Projanski, 465 F.2d 123, 139 (2nd Cir. 1972); Tillery v. United States, 411 F. 2d 644 (5th Cir. 1969); Gulley v. United States, 319 F.2d 77, 80 (6th Cir. 1963), cert. den. 375 U.S. 942, 84 S.Ct. 349, 11 L.Ed.2d 273 (1964); Moore v. United States, 356 F.2d 39, 43 (N.2)(5th Cir. 1966); Washington v. Texas, 388 U. S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019, on remand 417 S.W.2d 278 (Tex. Crim. App. 1967); United States v. Johnson, 343 F.2d 5, 6 (2nd Cir. 1965)

Members of the Jury, throughout my charge to you on the law regarding accomplice's testimony, I may on some occasions have used the term "accomplice" and on other occasions used the term "alleged accomplice". In all instances you are to treat my comments as meaning an "alleged accomplice". Under no circumstances are you to infer from the use of the term "alleged accomplice" that the defendant Vincent McCluskey is in any way considered to be guilty. To the contrary, the defendant Vincent McCluskey, as indeed all defendants in a criminal case, is absolutely presumed to be innocent until proven guilty, beyond a reasonable doubt. I have already discussed with you the requirements of reasonable doubt in my charge.

Request No. 14

Not Required to Accept Uncontradicted Testimony

You are not obliged to accept testimony, even though the testimony is uncontradicted and the witness is not impeached. You may decide, because of the witness' bearing and demeanor, or because of the inherent improbability of his testimony, or for other reasons sufficient to you that such testimony is not worthy of belief.

Yates v. United States, 407 F.2d 50, (1st Cir. 1969), cert, den. 395 U.S. 925, 89 S.Ct. 1781, 23 L.Ed.2d 242; United States v. Manuszak, 234 F.2d 421, 424 (3rd Cir. 1956).

Request No. 15

Conspiracy.

1. You are instructed that a conspiracy cannot be proved merely by proof, beyond a reasonable doubt, that one of the overt acts alleged in fact occurred. A conspiracy is an agreement or design by two or more persons to violate some law of the United States. An overt act is an act done to accomplish that design. Both must be proved beyond a reasonable doubt.

2. The defendants cannot be convicted of the crime of conspiracy unless the prosecution proves that the acts charged were committed by them with knowledge of the conspiracy, and that the things done by them and their alleged co-conspirators were in furtherance of and in execution of a general plan of conspiracy. If the defendants did the things charged in the indictment merely in violation of the law and not in furtherance and in execution of a general plan of conspiracy, they cannot be convicted of the conspiracy charge in the indictment.

3. You are instructed that the presence of a number of circumstances which raise the suspicion in your minds that the defendants committed or aided in the commission of the substantive offenses referred to in the indictment, does not permit a conviction for the crime of conspiracy unless you find that the government has established that those substantive offenses were committed in execution and furtherance of a plan and agreement.

4. The acts and declarations of one alleged to be a conspirator may not be used by you in determining whether any other person, who was not present at the time of such act or declaration, became a member of a conspiracy. In short, the membership of a defendant in the conspiracy alleged, must be established by what he himself said or did.

5. You may not find any person guilty of conspiracy without substantial evidence of his participation in an unlawful plan or agreement with full knowledge of the corrupt and unlawful purposes of the plan and of participating in the carrying out of the plan. The defendant cannot be convicted unless you are satisfied that he made any such plan a venture of his own.

6. If you find that any defendant committed some overt act, but you find that there is no substantial evidence connecting him with the unlawful agreement or plan to violate the law, you must find him not guilty.

. . . .

7. You are instructed that a conspiracy does not consist both of the conspiracy and the overt acts done to effect the objects thereof, but of the conspiracy alone. The Government is required to prove beyond a reasonable doubt that an actual unlawful agreement did exist. If you find that the Government has proven acts but has failed to prove a prior unlawful agreement or conspiracy beyond a reasonable doubt, it is your duty to return a verdict of not guilty.

8. The acts committed by any person who was a defendant, but who is found not guilty of the conspiracy, are not binding upon any of the other defendants.

9. Admissions made by any of the alleged conspirators are to be regarded only when made during the operation or carrying out of the conspiracy. Once the conspiracy is ended, whether by failure, success or arrest, such admissions made by the other defendants or conspirators are incompetent as against the defendants and you are instructed to disregard and ignore such admissions.

10. You are instructed that you may not consider against any defendant, any act or declaration or statement made by any of his codefendants out of his presence as tending in any manner to establish his guilt, unless you first find that the following situations exist:

a. that the act, declaration, or statement was made during the existence of the alleged conspiracy;
b. that the act, statement or declaration was done or made in furtherance of the object of the conspiracy;
c. and that the defendant is himself shown to have been a member of the conspiracy by his own acts and statements.

If any of the three situations does not exist, then you may not consider acts and declarations of alleged co-conspirators against defendant.

11. You are instructed that you may not convict any defendant under the conspiracy count of the indictment unless you first find beyond a reasonable doubt, that the defendants know that the merchandise in question was a part of an interstate shipment, and that they knew it was stolen while moving in interstate commerce. Even if you find from the evidence and beyond a reasonable doubt that the defendants knew that the shipment was stolen, you must further find from the evidence and beyond a reasonable doubt, that defendants knew that it was stolen while moving in interstate shipment. If the evidence on this score is lacking, or if you are not convinced beyond a reasonable doubt that the defendants had such knowledge of the interstate character of the shipment of the goods, then you are directed to return a verdict of not guilty.

12. Before you can convict the defendant of the crime of conspiracy you must first find that he entered into an agreement with others to violate the law. Mere knowledge by others of his plan to violate the law without their agreeing to join in the plan is not sufficient. Mere knowledge by the other defendants that the law was being violated, without their joining in an agreement to violate the law, is not sufficient to spell out the crime of conspiracy. Mere aid or assistance given by the defendant to others to violate the law is not sufficient to convict him of the crime of conspiracy, unless such aid was given by him for the purpose of carrying out the unlawful design of a conspiracy agreed to by him and the others.

13. The defendant cannot be convicted of conspiracy without proof that he committed the acts charged with knowledge of the conspiracy, and that the things done by his alleged co-conspirators were in furtherance of and in execution of a general plan of conspiracy. If the defendant did the things charged in the indictment merely in violation of the law and not in furtherance and in execution of a general plan of conspiracy, he cannot be convicted of the conspiracy charged in the indictment.

14. The presence of a number of circumstances which would lead to the suspicion that the defendant committed or aided others in the commission of the substantive offenses referred to in the indictment, does not warrant his conviction for the crime of conspiracy, unless you first find that the substantive offenses were committed in execution and furtherance of the plan and agreement charged in the indictment.

15. The proof shows that the defendant met and knew the other persons named in the indictment as co-conspirators. I charge you that a defendant cannot be convicted because of his acquaintance or association with some or all of the conspirators named in the indictment unless it is proven by the Government beyond a reasonable doubt, that he had guilty knowledge of, and with such knowledge, participated in the conspiracy or in furtherance thereof.

16. The mere fact that ten persons are on trial together cannot be considered in any way as indicating that they participated in a common plan, agreement or conspiracy to violate the law. The mere fact that they may be associated in the same union, group or industry cannot be considered by you as proof of their joint participation in a common plan, scheme or conspiracy.

17. You are instructed that there can be no conspiracy without a corrupt agreement or understanding. If you have a reasonable doubt as to the participation of any defendant in the common plan or conspiracy, you must return a verdict of not guilty as to him.

18. The presumption of innocence as to each defendant applies to the conspiracy charge as a whole and to every material element of that charge. You must presume that the defendant had no intent to commit a crime or engage in a conspiracy and that he did nothing corrupt with knowledge of the objects of the conspiracy. It is presumed that the defendant did no corrupt act in furtherance of the conspiracy. The burden to overcome these presumptions rests upon the Government and the failure of any defendant to testify does not create any presumption against him. The defendant is never required to prove his innocence, the Government must prove his guilt and that proof must convince you beyond a reasonable doubt.

19. If you find that two or more of the defendants conspired together to violate the statute, and that they did certain things without knowledge of the other defendants, and not in concert with the others, and not as part of a common plan or agreement in which all participated, then I charge you that the conspiracy charged in this indictment has not been established and your verdict must be not guilty as to all defendants who did not participate in the scheme or conspiracy as charged in this indictment.

20. I charge you that the mere similarity of conduct by several defendants, even if some of them were associated with each other does not permit you to infer that the conspiracy charged in the indictment has been established. In order to establish the existence of a conspiracy, the Government must prove beyond a reasonable doubt that these defendants knowingly and wilfully associated in the unlawful, common enterprise as charged in the indictment and, in addition, to such mutual agreement that they participated in it wilfully with intent to effect the object thereof.

21. You are instructed that suspicion, however strong, is never proof under our concept of law and you may not substitute suspicion for evidence. Any inference of participation in this conspiracy cannot be made from the mere association and friendship between some alleged co-conspirators or between some defendants.

22. If you find from the evidence that any defendant in this case had no knowledge of the conspiracy charged in the indictment you are instructed that such persons are not conspirators even if their actions appear to have furthered the object of the conspiracy. Thus, if a defendant committed an overt act which appears to be in furtherance of the conspiracy but without knowledge of the existence of any conspiracy, you must find him not guilty.

23. You are instructed that the existence of the conspiracy and each defendant's connection with it must be established by independent proof, based upon the reasonable inferences to be drawn from such defendant's own actions, his own conduct, and his own declarations.

24. In order to find a defendant guilty of conspiracy, you must find beyond a reasonable doubt that he actively participated in the conspiracy. Mere knowledge of an illegal act on the part of an alleged co-conspirator is insufficient proof of guilt.

25. You are instructed that the fact that the defendant may have participated in the offense which was the object of the conspiracy does not necessarily prove him guilty of conspiracy. The evidence must convince you that he did something other than participate in the offense which was the subject of the conspiracy. There must be proof of an unlawful agreement and participation therein with knowledge.

26. I charge you that before you can find either defendant guilty, you must find from the evidence in this case, beyond a reasonable doubt, that each of them was a member of the conspiracy as charged in the indictment. I charge you that before you can convict the defendants, you must find beyond a reasonable doubt from all of the evidence in this case, that they had knowledge of the alleged conspiratorial acts of the other defendants, and with this knowledge wilfully entered into an agreement or combination with such others to carry out the agreement by their active participation, acquiescence and approval of the acts of the others.[10]

27. You are instructed that mere participation in the substantive offense which was the alleged object of the conspiracy does not establish the defendant's guilt of the crime of conspiracy. The evidence must establish that the defendant also knew of the unlawful agreement and participated therein with such knowledge.[11]

10. United States v Reina (CA2 NY) 242 F2d 302, cert den 354 US 913, 1 L Ed 2d 1427, 77 S Ct 1294, reh den 355 US 852, 2 L Ed 2d 61, 78 S Ct 9; United States v Ah Kee Eng (CA2 NY) 241 F2d 157, 62 ALR2d 159.

11. Goodman v United States (CA9 Cal) 128 F2d 854; Dahly v United States (CA8 Minn) 50 F2d 37.

Request No. 16

D

Intoxication

1/ It is for you to determine the extent of the defendant's intoxication, and whether it operated to prevent his forming the intent necessary to constitute the crime.

2/ Whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute a particular type or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act. Any intoxication not necessarily total, may be considered on the question of intent.

3/ The term "Intoxication" means a condition resulting from the drinking of alcoholic beverages which impair a person's normal faculties --either of perception or will or judgment -- so that he or she no longer has the capacity to know the nature of the act he is committing or the capacity to from an intent to commit such an act.

People v. Sanchez, 35 Cal 2d 522, 219 P2d 9;
State v. Schrader, 243 Iowa 978, 55 NW 2d 232;
Hall v. Commonwealth, 310 Ky 718, 221 SW2d 652;
McFarland V. State, 212 Miss 802, 55 So 2d 457.

Smith v. People, 120 Colo 39, 206 P2d826; People v. Bryce, 5 Ill 2d 296, 125 NE 2d 449; State v.

Alexander, 251 La 245, 40 So 2d 232; People V. Guillett, 342 Mich 1, 69 NW 2d 140.

Wheatley v. United States (CA 4 W Va) 159 F2d 599; Britts v. State, 158 Fla 839, 30 So 2d 363; People v. Schneider, 362 Ill 478, 200 NE321; People v. Koerber, 244 NY 147, 155 NE 79.

Request No. 17

D

Knowledge:

I ask Your Honor to charge the jury that where there was more than one defendant and they were charged with conspiracy, in order to convict any defendant of the crime of murder, the jury must be satisfied beyond a reasonable doubt that each defendant knew of the proposed killing in advance, and planned and encouraged it.

The defendants in this case cannot be convicted, in the absence of proof beyond a reasonable doubt, of their knowledge, connivance or consent to the killing of the decedent. A defendant cannot be held criminally responsible for any deed done by other persons if it does not appear beyond a reasonable dbout that the general purpose was contemplated or assented to by him and was done with his knowledge.

In order to convict the defendants the jury must be satisfied beyond a reasonable doubt that the defendants, each of them, knew of the proposed killing in advance and planned and encouraged it.

I instruct you that in order to find the defendants guilty you must find, beyond a reasonable doubt, that they

knew of the alleged falsity of the statements as referred to in the indictment and that they knowingly used the said statements in order to defraud the Government.

Ingram v. United States, 360 US 672, 3 L Ed 2d 1503, 79 S Ct 1314, reh den 361 US 856, 4 L Ed 2d 96, 80 S Ct 42; Linde v. United States (CA 8 SD) 13 F2d 59; West v. State, 25 Ala App 492, 149 So 354; Anello v. State 201 Md 164, 93 A 2d 71; People v. Weiss, 290 NY 160, 48 NE 2d 306; Anderson V. State, 66 Okla Crim 291, 91 P2d 794; Lee v. State, 152 Tex Crim 401, 214 SW 2d 619

Ingram v. United States, 360 US 672, 3 L Ed 2d 1503, 79 S Ct 1314, reh den 361 US 856, 4 L Ed 2d 96, 80, S Ct 42; Linde v. United States (CA 8 Sd) 13 F2d 59; West v. State, 25 Ala App 492, 149 So 354; Anello v. State, 201 Md 164, 93 A2d 71; People v. Weiss, 290 NY 160, 48 NE 2d 306; Anderson v. State, 66 Okla Crim 291 91 P2d 794; Lee v State, 152 Tex Crim 401, 214 SW 2d 619.

Request No. 18

Motive:

The jury is instructed that in its deliberations upon the question of the defendant's guilt or innocence, it may consider the lack of motive to commit the crime charged.

Hamilton v. State, 169 Ga 613, 151 SE 17; State v. Johnson, 139 La 829, 72 So 370; Feldman V. State, 45 Ohio App 428, 14 Ohio L Abs 202, 187 NE 201; State v Coleman, 20 SC 441; Orange v. Commonwealth, 191 Va 423, 61 SE 2d 267.

Request No. 19

If you do not find beyond a reasonable doubt that the defendant VINCENT McCLOSKEY did unlawfully kill William Hickey and that such killing was done with malice aforethought and that the killing was committed in the perpetration of or an attempt to perpetrate a robbery, then you must find the defendant, Vincent McCloskey, innocent.

Request No. 20

Accomplices and Co-Conspirators:

1. The testimony of an accomplice or co-conspirator must be weighed with great care and be scrutinized closely, carefully and cautiously. This testimony, which is subject to great suspicion, must be viewed with distrust and acted on only after due and careful deliberation.[6]

2. The testimony of an accomplice or co-conspirator is testimony from a tainted source.[7]

3. The testimony of accomplices must be scrutinized with great care and caution.[8]

4. While you may convict the defendant upon the uncorroborated testimony of an accomplice,[9] nevertheless, before you should decide to do so, you must review that testimony with caution and decide that it is clear and convincing and that it has been proven to your satisfaction that the defendant is guilty beyond a reasonable doubt.[10]

5. The motives of an accomplice or co-conspirator in testifying, and the circumstances under which his testimony is given, should be considered in determining how much weight and credibility his testimony should be given.[11]

6. In determining the weight and consideration of the testimony of an accomplice or co-conspirator, you must consider whether there has been any promise to him or indication of favorable treatment for him or actual benefit conferred, promised or indicated by the circumstances of the case.[12]

7. You will recall that testimony of acts and statements made by alleged co-conspirators in the absence of a defendant was received on a tentative basis in evidence. This testimony was received subject to independent proof of the existence of the conspiracy and the absent defendant's knowing participation in the conspiracy. If you do not find, on independent proof, that a conspiracy existed and that the absent defendant knowingly participated in the conspiracy, that tentative basis is destroyed and all such testimony must be ignored as to such absent defendant.

8. You are instructed that an accomplice is a person tainted with confessed criminality. He may have been influenced in his testimony by the strong hope of favor or pardon.

9. In determining the interest which an accomplice has in the case you are free to weigh and consider the fact that he has been indicated for the offenses which he admittedly has committed and that if he testifies fully and freely he is entitled to some consideration from the Government. You have a right to consider all of this in determining the weight which you will give his testimony.

10. X is named in the indictment as a co-conspirator. He is not charged as defendant, nevertheless, by his testimony he is self-confessed accomplice. An accomplice, when he gives evidence against other persons may be impelled to do so by motives which may preclude his telling the truth. In other words he may have a reason to lie as to material facts, and it is your duty to give careful consideration to that fact. An accomplice, tainted as he is with a past criminality, is often influenced in his testimony by motives of favor or pardon. Therefore, you must look carefully into any secret motives which might actuate bad minds and victimize the innocent. You are cautioned to scrutinize his testimony with great care and caution.[13]

11. You are instructed that the testimony of one accomplice witness cannot corroborate the testimony of another accomplice witness. I further instruct you that the witness X is an accomplice, that is to say, he has testified that he committed the offenses alleged in the indictment. Furthermore, the witness Y is likewise an accomplice for the same reason.

I charge you that the testimony of the witness X may not be considered as corroborating or lending credence to the testimony of of the witness Y, nor may the testimony of the witness Y be regarded as corroborating or lending credence to the testimony of the witness X. Such testimony must be regarded by you as arising from the same tainted source.

DENIED

Request No. 21

Miscellaneous

1. No individual point, instruction, sentence or phrase is to be considered any more important than the remaining portions of the instructions or charge. No emphasis is intended by the Court and none is to be inferred. The jury is to consider all the instructions as a whole and regard each in the light of all the others.[17]

2. The charges to the jury on questions of law, at the request of the defendant or his counsel, should receive as much consideration as any other part of the Court's charge.[18]

3. "The charges on questions of law, which I have given you (the jury) at the request of counsel for the defendant, are the law of the State of New York, and it is your duty to follow those instructions."

4. The rights of each of the defendants are separate and distinct and an independent verdict must be brought in as to each of them.[19]

5. The various crimes charged in this indictment are separate, distinct and independent crimes which must be considered by the jury separately as such.[20]

6. The jury must consider each and every count as if it were a separate offense, charged in a separate indictment. Before they can convict the defendant of any single count in the indictment, they must find beyond a reasonable doubt that the defendant(s) committed or aided, abetted, procured, counseled or advised in the committing of that specific offense.

7. Before the jury may convict the defendant of any of the counts in this indictment, they must find the offense charged therein is proven beyond a reasonable doubt by evidence which is corroborated in every material respect.[1]

8. Each defendant is charged in a separate indictment. The jury must consider the charges contained, therein, independently. They must, in addition, consider each count of each indictment separately as to the charges made against the respective defendants.[2] Before the jury can convict a defendant on any count of the indictment, the prosecution must prove beyond a reasonable doubt

each and every aspect of the elements of the offense charged as to each defendant.[3]

9. The jury may find the defendant not guilty of the crime charged in the indictment, but guilty of some degree inferior thereto, or an attempt to commit the crime. If there is reasonable ground of doubt in their minds only as to the degree, the defendant can only be convicted of the lowest of those degrees.[4]

10. When it appears that a defendant has committed a crime and there is reasonable ground for doubt, in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only; but never of even the lowest degree unless every element of said degree has been proven beyond a reasonable doubt.[5]

11. The jury is at liberty to find one or more of the defendants guilty and the others not guilty.[6]

12. If the jury cannot agree upon a verdict as to all of the defendants, they may enter a verdict as to those in regard to whom they do agree.[7]

13. If, after the jury has retired, there arises among them a disagreement as to any part of the testimony, or if they desire to be informed of a point of law arising in the case, they must ask to be brought back into the court where the information will then be given them.[8]

14. While it is your duty to confer with your fellow jurors and discuss the evidence with them, the verdict which you render must represent the real judgment and honest conclusion of each of you, and I charge you, upon your oaths, and as a matter of law, that each of you has the duty to arrive at your conclusion separately, and that no one of you may surrender his earnest belief concerning the guilt or innocence of the defendants for the purpose of preventing a disagreement or arriving at a compromise.

15. It is the duty of each juror, while you are deliberating, to give careful attention and consideration to the views of his fellow jurors, and to discuss the facts with them. Each juror acts for himself and must reach his own judgment after discussion of the facts with the other jurors. If, after such discussion and deliberation, a juror entertains a reasonable doubt of the guilt of a defendant he should find him not guilty.

16. It is your duty to confer with your fellow jurors and discuss the evidence with them. The verdict you render must represent the real and honest conclusion of each of you, and no one of you may surrender his or her earnest belief concerning the guilt or innocence of any defendant for the purpose of preventing a disagreement, or for the purpose of arriving at a compromise, notwithstanding the length and duration of this trial.

17. While it is the duty of the jurors to confer and deliberate with one another, before arriving at a verdict, nevertheless, if any juror after such deliberation conscientiously reaches a decision on the facts, he has no right to surrender his decision to the decision of the majority, if he believes that his decision is correct.

18. The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your own individual judgment. Each of you must decide the case for yourself. You should not surrender your honest conviction as to the weight and effect or evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are the judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Respectfully submitted

JOHN F. MARTIN
Attorney for Defendant
VINCENT McCLOSKEY
342 Madison Avenue
New York, New York 10017
212 - 279- 6995

December 7, 1973

United States Attorney
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Att: John J. Kenny
Assistant United States Attorney

Re: United States of America
vs. Vincent McCloskey
Indictment No. 73 CR 855 (CMM)

Dear Mr. Kenny:

Having entered the case at the eleventh hour and being unfamiliar with the file and previous proceedings, I had requested your office to furnish me with copies of all of the pleadings, prior motions and other documents which you felt could be released to me under the existing Rules of the Court.

I made this request to expedite my preparation and understanding of the case and to generally save time in the preparation for trial.

A search of the Court files showed that there were many missing documents and the files obtained from Mr. Goldberg also appear to contain many lapses in documents and information. I presume that your files might contain more documents and so make the task speedier and more expeditious.

Your advice to my associate, Mr. Carey, to the effect that you would furnish to us any documents pertaining to the defendant, VINCENT McCLOSKEY, only which we would specifically request and at a cost for duplication, while helpful, does not resolve our dilemma and does not help us with the prime objective of saving time in preparing for trial.

In view of the fact that I must request specific documents it seems that seeking help from your office will be in vain.

Continued.....

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Should you relent, however, and feel that there are papers in your file involved in the case which might save me time in preparing for trial, I would appreciate your having them photostated and forwarded to me or otherwise make them available to my office. We stand ready to pay such charges as are incurred in the duplication process and will also furnish a messenger.

Thank you for your kind attention and consideration.

Very truly yours

John F. Martin

JFM/McG

cc: Hon. Charles M. Metzner
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA :

- v - : AFFIDAVIT

WILLIAM McCLUSKEY, a/k/a Billy : 73 Cr. 972 (CMM)
and HARRY JOHNSON,
:
Defendants.
- - - - - - - - - - - - - - - - - - -x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

JOHN J. KENNEY, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York and, as such, I am assigned to and familiar with the facts and prior proceedings in the above captioned matter.

2. This affidavit is made in support of the government's oral motion, pursuant to Rule 13, Federal Rules of Criminal Procedure, to join the present indictment with indictment 73 Cr. 855 for the purpose of trial.

3. The government's proof at trial will show that the offenses charged in both indictments are based on the same acts and transactions and could have been joined in the same indictment.

4. All of the defendants named in Indictment 73 Cr. 855 have been named as co-conspirators but not defendants in the present indictment.

5. The government intends to offer proof at trial that all of the defendants and co-conspirators in both indictments agreed to commit the armed robbery of a United States mail truck and that William McCluskey and Harry

JA:sic
3-1865
-88

Johnson, defendants herein, were present at the scene of the crime on April 5th, 1973, when TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN, defendants in Indictment 73 Cr. 855 actually attempted the robbery of a mail truck. It was a result of this attempt that William Hickey, the postal guard, was killed and Crawford Lawrence, the mail truck driver was wounded.

6. The conspiracy to rob a mail truck and to jeopardize the lives of the guard and driver is the basis for the charge in count one of both indictments; the killing of Hickey is the basis for the charge in count two of both indictments, and the wounding of Crawford Lawrence is the basis for the charge in count three in both indictments.

WHEREFORE, the government respectfully requests that said indictments be joined for trial.

JOHN J. KENNEY
Assistant United States Attorney

Sworn to before me this
14 day of November, 1973.

United States District Court
Southern District of N.Y.

United States of America — INDICTMENT 73 Cr 855

v

Thomas Joseph Carroll

Upon the following citations and cases the undersigned moves for a mistrial, or in the alternative for a reversal of the Defendant Vincent McCloskey in the event that any written or oral admissions of the Defendant Robert E. Riffey or any other Defendant are admitted into evidence.

a U.S.C.A. Const Amend 6
b BRUTON Vs. UNITED STATES 391 U.S 123
c. CHARLES Vs. MISSISSIPPI 410 US 284 (decided Feb. 21, 1973)
d U.S. Vs. MORALES 477 F 2D 1309 (decided April 18, 1973)
e CLARK Vs. STATE 509 P2D 1398 (Page 1401) In the original County case.

A Copy of U.S. Morales is attached by Xerox for its condition but the Copy machine was faulty

John F. Martin
Atty for Defendant
Vincent McCloskey

342 Madison Ave N.Y.C 1144

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. District Court
FILED
FEB 20 1974
S. D. OF N. Y.

CASE NO. 73 CR 855, 73 CR 583, 73 CR 606

UNITED STATES OF AMERICA

vs.

THOMAS JOSEPH CARROLL, JOHN DOE a/k/a "JACK", VINCENT McCLOSKEY, a/k/a/ "MIKE", ROBERT E. RIPPY, a/k/a/ "RIPP", CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DELAY MYERS and GEOFFREY MATTHEWS MANN,

Defendants

IT IS HEREBY STIPULATED and agreed by and between the United States Attorney for the Southern District of New York, attorney for the UNITED STATES OF AMERICA and the Attorney for the Defendant, VINCENT McCLOSKEY, and the Attorney for the Defendant, WILLIAM McCLOSKEY, that the following documents shall be included in the Record on Appeal herein and shall be included in the Supplemental Record on Appeal which will be forwarded by the Clerk of the District Court of the United States for the Southern District of New York.

Date of Document	Description
2 11/8/74	
November 23, 1973	Letter from Chambers of Charles M. Metzner to Jay Goldberg, Esq. forwarding a copy of a psychiatric report from Springfield, Mo.
September 19, 1973	Complaint against William McCloskey
June 11, 1973	Original indictments: 73 CR 855, 73 CR 583, 73 CR 606
	Defendant, Vincent McCloskey's Request to Charge
1 DEC. 7, 1973	Letter to Judge Metzner from Assistant U.S. Attorney Jay Goldberg
~~Dec. 7, 1973~~	~~Letter to Judge Metzner from Jay Goldberg~~
F Nov. 16, 1973	Court's Morning Affidavit for Search Warrant

Date of Document	Description
4 Stamped December 14, 1973	One page Motion for Mistrial and Severance of Defendant, Vincent McCloskey, if Oral Admissions Allowed in Evidence

DOCUMENTS ORDERED INTO EVIDENCE AND REJECTED BY THE COURT

Exhibit Number	Description
~~1.~~	~~Map of downtown section of Manhattan~~
2.	Map of downtown section of Manhattan
~~3.~~	~~Resume of oral statement by Rippy to Postal Inspector June 13, 1973 with second page comprising a signature by Rippy concerning rights~~
~~4.~~	~~Photograph of William and Beekman Street area~~
~~5.~~	~~Photograph of area near William and Beekman Streets~~
~~6.~~	~~Photograph in area of Nassau and Beekman Streets~~
~~7.~~	~~Photograph in area of Nassau and Spruce Streets~~
~~8.~~	~~Photograph of area in vicinity of Spruce and William Streets~~

Dated: February 20th, 1974

PAUL G. CURRAN
United States Attorney

BY ~~John J. Kenney~~
Asst U.S. Atty

Attorney for Defendant, Vincent McCloskey

So Ordered
Charles Metzner
USDJ

Attorney for Defendant, William McCloskey

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

U.S. COURT OF APPEALS:SECOND CIRCUIT

Index No.

U.S.A.,

Appellee,

against

CARROLL, et al,

Defendants-Appellants.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James Steele, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 10th day of June 1974 at Foley Square, New York

deponent served the annexed Appellant's Brief upon

Paul J. Curran-U.S. Attorney Southern District-Attorney for Appellee

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

James Steele

Print name beneath signature

Sworn to before me, this 10th day of June 1974

JAMES STEELE

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975